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Supreme Court of the United States

OCTOBER TERM, 1964

No. 2

ARTHUR HAMM, JR., PETITIONER,

vs.

CITY OF ROCK HILL.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA**

PETITION FOR CERTIORARI FILED APRIL 10, 1963

CERTIORARI GRANTED JUNE 22, 1964

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

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South Carolina

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[fol. 1]

STATEMENT

Appellant, along with Rev. C. A. Ivory, now deceased, was arrested on June 7, 1960, and charged with the offense of "Trespass."

Rev. Ivory was tried in the Recorder's Court of the City of Rock Hill on June 29, 1960. At the conclusion of all of the evidence, City Recorder Billy D. Hayes found Rev. Ivory guilty and sentenced him to pay a fine of One Hundred (\$100.00) Dollars or serve thirty (30) days in prison.

Thereafter, it was stipulated that the testimony which had been adduced at the trial of Rev. Ivory, would be applicable to the appellant, Arthur Hamm, Jr. At the conclusion of these proceedings, appellant Hamm was likewise found guilty by the City Recorder and sentenced to pay a fine of One Hundred (\$100.00) Dollars or serve thirty (30) days in prison. Notice of Intention to Appeal as to both defendants was duly served upon the City Recorder.

Thereafter, the matter was argued before Honorable George T. Gregory, Jr., Resident Judge, Sixth Judicial Circuit.

Thereafter, Rev. C. A. Ivory died.

On December 29, 1961, Judge Gregory issued an Order, affirming the judgment of the City Recorder but noting the untimely death of Rev. Ivory.

Notice of Intention to Appeal was thereupon duly served upon the City Attorney.

[fol. 2]

**IN THE RECORDER'S COURT OF THE
CITY OF ROCK HILL, STATE OF SOUTH CAROLINA**

CITY OF ROCK HILL,

v.

ARTHUR HAMM, JR.

City of Rock Hill

ARREST WARRANT

The State of South Carolina,
County of York.

Personally comes before me W. S. Rhodes, and makes oath on information and belief that in said City of Rock Hill, in the county and State aforesaid, on the 7th day of June, 1960, at or about 12:00 noon, one Arthur Hamm, Jr., did willfully and unlawfully trespass upon privately owned property by remaining along with one Rev. C. A. Ivory at the lunch counter in McCrory's variety store, which is customarily operated upon a segregated basis, and refusing to leave said counter, after the Manager of said store, in the presence of City Police Capt. John M. Hunsucker, Jr., advised him he would not be served and specifically requested him to leave said lunch counter, and after the aforesaid police officer thereupon advised him that he would be arrested for trespass unless he left said premises as directed, which he nevertheless failed and refused to do, all of which was done at a time when racial tension was high due to numerous recent prior demonstrations against segregated lunch counters refusing service to members of the Negro race of the defendant, both within the City and throughout the South generally, followed by numerous recent trials of demonstrators before this and other Courts on charges of breach of peace or trespass as a result of such demonstrations, and all of which resulted in and constituted a trespass by the above-named defendant,

contrary to the peace and dignity of the State of South Carolina, and in violation of the ordinances of the City of Rock Hill and that Capt. John M. Hunsucker, Jr. and [fol. 3] Harry S. Barnette, the arresting officer (s), together with others are witnesses for the City of Rock Hill, S. C.

W. S. Rhodes.

Sworn to before me, this 7th day of June A. D., 1960.
Billy D. Hayes (L.S.), Recorder.

Arrest and bring before me the Defendant above named, Arthur Hamm, Jr., to answer the charge of Trespass and the witnesses for the City of Rock Hill, S. C., herein named.

Given under my hand and seal, this 7th day of June, 1960.

Billy D. Hayes (L.S.), Recorder.

IN THE RECORDER'S COURT OF THE CITY OF ROCK HILL,
STATE OF SOUTH CAROLINA

Transcript of Trial Proceedings—June 29, 1960

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Spencer: If it please the Court, the City is ready to proceed in the case of *the City of Rock Hill against Reverend C. A. Ivory*, charged with the offense of trespassing on June 7, 1960. Is the defense ready?

Mr. Sampson: We are ready, and we would like to renew a motion that we made earlier.

The Court: All right, let me do this first. I want to clear up the jury situation first.

Mr. Sampson: All right, sir.

The Court: I would now like to ask you gentlemen who are sitting in the jury box at the present time if any of you feel that you have a legal reason or justification for not serving on this jury. If you do, if you would let me know now, so that we might discuss that matter first.

(No response.)

[fol. 4] The Court: in that event, Mr. Morton, Mr. Harry R. Morton, Mr. James H. Jordan; we seem to have two James H. Jordans; they are two different people, I assume; we have got one on the jury, right? I see.

I might announce for Mr. Spencer's concern that I told the newsreel cameramen they could take pictures for about five minutes, so if you want to look your prettiest for about five minutes, they are going to take some pictures.

Mr. Spencer: If it please the Court, I was just calling to the attention of defense counsel the fact that one of the jurors, one of the Jordans to whom you referred, is a member of the City Fire Department, and as such is an employee of the City, and while that does not quite disqualify him, it might raise a question in the mind of the defendant as to whether or not he would be subject to any bias in favor of the City of Rock Hill. I therefore consented and agreed that we would pass that juror over, and call the next in order of the supernumeraries, and that is agreeable to defense counsel, is that correct, Mr. Sampson?

Mr. Sampson: We will concur in that, Your Honor.

The Court: By consent of counsel, then, we will excuse juror James H. Jordan, Jr., from service on the jury. All right, Mr. Harry R. Morton seems to be the first supernumerary. Now, Mr. Morton, you heard the questions I propounded to the jurors a moment ago. Do you feel that you have a legal reason for not serving on this jury?

Mr. Morton: No, sir.

The Court: All right. Now, I am going to hear a legal matter, and I am going to swear the jury first, and then, if you will, as soon as I swear you, if you will, just go into this room right here, and while you are in there, please elect your foreman. When you come back, tell me [fol. 5] who the foreman of the jury is, and I will ask the foreman of the jury to take this seat next to the filing cabinets, whichever one of you is elected by the remaining jurors; so if you will stand and hold up your right hands, please.

(Jury sworn.)

The Court: Thank you, gentlemen. Now, if you will go into this room right here and elect your foreman, so you can tell us who is foreman when you return.

How does the defendant plead?

Mr. Sampson: May it please the Court, if you would permit a plea by counsel, the plea is not guilty, and if you would like a plea by person, we will be glad to have him plead likewise.

The Court: I am sure that it is perfectly all right.

Mr. Spencer: Does the defendant waive formal publication of the warrant?

Mr. Sampson: The defendant does waive formal publication of the warrant.

The Court: All right, you say you have a motion.

Mr. Spencer: If it please the Court, before defense counsel proceeds on hearing the motion, I would like to state that as Your Honor knows, there was a preliminary motion filed prior to the commencement of these proceedings this morning, a motion to quash the information and dismiss the warrant, on which Your Honor has already ruled, and refused to allow the motion. However, in an effort to meet some of the matters which defense counsel indicated they considered objectionable, the City has elected at this time to amend the warrant to eliminate the references therein to what we have referred to as the background situation, and I now pass the defense counsel a copy of the amended warrant.

[fol. 6] Mr. Sampson: May it please the Court, after a summary look at this warrant, we agree that as submitted by the counsel for the City, we believe it meets the objections in our motion to quash the information and dismiss the warrant, which was originally filed on June 14th; however, we still have a further request to make in reference to the warrant.

The Court: In other words, you withdraw the original motion?

Mr. Sampson: May it please the Court, we have a motion here, and as I understand it the City has a right to amend its warrant if they do it any time before trial, and the warrant which they now present to us is acceptable

to us, and would not be subject to the reasons solicited in our original motion to quash the information; however, our position in summary is that in connection with this warrant, we had an additional matter to request of the Court, which we raised on June 14th. We would like to be informed, the defendant would like to be specifically informed if possible as to the exact statute or ordinance that this warrant is drawn under, or the common law. In fact we desire to be informed by the City exactly what law he is relying on; we would like to know all of the statutes involved.

Mr. Spencer: May it please the Court, as I am sure Your Honor will recall, at the hearing of the preliminary motion in this matter, the City of Rock Hill then took the position, and now renews the position, that it relies upon all of the available law that has a proper bearing upon a relationship to the offense charged.

It is the position of the City that we are not required to specify or spell out exactly what body or provision of law we rely upon, but that we are in fact to rely upon any law which the proof of the facts alleged in the warrant would bring into force, with reference to the offense [fol. 7] charged. I believe Your Honor has already ruled that we do not have to specify.

Mr. Sampson: May it please the Court, we don't want to prolong this with an undue preliminary, but we think that as a matter of due process of law, in a criminal matter, there are several criminal statutes on the book, and we think that we are entitled to know if they are relying on any ordinance or statutes, specifically which one we are going to have to defend against.

We take the position that we will more fully point out later on, that one or two of the areas of the law which this warrant may be related to are unconstitutional, and we would like to lay a proper groundwork for that. We don't think that this is an unreasonable request; we assume that it is so elementary, really that there would not be any objection to it; because we are cognizant of the fact that this is the City of Rock Hill; and that there is a section of the ordinances of the City of Rock Hill that may or may not have some reference to this particular cognizance; and we have some idea, we hope, so far as the

State laws, several sections deal with trespass, and we have some idea about another law which was very recently passed, and we think that they vary in intent and background and so forth on the elements in the one being proven as a coercion of *corpus delicti*, and, therefore, we think it very reasonable to ask him which one he is proceeding under. That's all we want to know.

The Court: Can you give him any specific section which you are including without limiting yourself?

Mr. Spencer: Yes, Your Honor, I was about to say this, that I am perfectly willing to point to the sections that we consider applicable, but I simply state that I do not believe that the defense counsel has the right to [fol. 8] require that we be limited to some one specific provision of law.

The Court: I would not limit you to any specific provision.

Mr. Spencer: Following through on that, I state that we rely upon, amongst other things, the following: the 1960 State Act having to do with the mode of trespass, which was approved by the Governor, and became effective on May 16, 1960, which is identified as Ratification No. 896, and introduced in the General Assembly as House Bill No. 2135. I do not yet have the State Act number.

The Court: Well, are there any others?

Mr. Spencer: Just one moment. May it please the Court, the City also relies upon Section 16-386 of the 1959 Cumulative Supplements to the Code of Laws of South Carolina for 1952, embodying the section as contained in the original Code as amended in the year 1954.

The City also relies upon the Code of the City of Rock Hill, 1948, Chapter 19, Section 42.

Now, without waiving the right to rely upon any other sections, I would say that that constitutes the primary things to which the City looks at this time.

Mr. Sampson: May we hold that a minute? We appreciate—

The Court: All right, tell the jury to come on in. Do you have another motion?

Mr. Sampson: In connection with the same one, may it please the Court that if you would indulge us just a

moment, it is our position, having been informed of the exact statutes which apparently the City is relying on, that we feel that possibly the Court may, if it be in order, or should, if it be proper, request so as to really determine beforehand whether or not, under this particular warrant, whether or not the defendant could be charged under each one of them. We think that the procedure can be accelerated. Of course, our position now and later on, would be, in that connection, that the particular statutes as mentioned by the City, are unconstitutionally applied to this particular defendant; of course, that may be a question upon which the Court might like to reserve a ruling on, but if possible, we have the statutes here, and I quite frankly think that the Rock Hill statute which the defendant, excuse me, which Mr. Spencer for the City has mentioned, is very similar, if not the same, as the State Code Section 16-386, with the supplements thereto. I could be wrong on that, but we think that those two are connected. Really the City is adopting the State statute in its ordinance, and moreover, if that were true, why actually you would be having two statutes here instead of one. Now this particular one, may it please the Court, is rather new, and we would like to know whether or not we would be entitled to an election if both of them are applicable; if one is not applicable and the other one is; then I think we can accelerate this case a great deal if we knew exactly which statute we would have to defend against.

Now, we can probably concede for the purposes of argument that a citizen may violate more than one statute, and of course, the particular statute may hit more than one level of government, but so far as one warrant is concerned, that is the City of Rock Hill, if a municipality and so forth, as it stands apart from the State, and it is the position of the City that this is incorporated by some means, which we don't agree with, that, of course, would be one thing. Now, on the other hand, if it is not their position that they are separate and distinct, we are in a position here [fol. 10] that we have got to worry about a *corpus delicti* and a *prima facie* case, the City ordinance, the State ordinance, and then a more recent ordinance, we would concede, of course, I am sure the Court will agree that this is

slightly different phraseology and wording and everything else, we don't understand it either, and I am not saying that the Court doesn't understand it, but the whole intent, we believe, may it please the Court, under this ordinance of May, 1960, the elements involved in it are different from the others, even though we will concede that the language of this warrant apparently incorporates some of the language that is incorporated in this statute, and moreover, we would like permission to let Mr. Perry more amply state this particular position.

Mr. Perry: I just wanted to state in addition to everything Mr. Sampson has stated on the motion, Your Honor, that if it appears that the warrant charges one offense, it charges that Reverend Ivory committed a certain act on June 7, 1960, it does not allege that he committed more than one act.

All three of the statutes involved, the two State statutes and the municipal ordinance that Mr. Spencer has cited, all have reference to trespass. They all, however, adopt slightly different phraseology, and we take the position that Reverend Ivory can be convicted, if at all, only once, on account of the activities of June 7th; so to subject him to two State statutes and one municipal ordinance would be in effect to deny, we think, due process. We think that under the circumstances the City should be required to elect which statute or ordinance it is going to proceed upon, then let its proof conform as nearly as possible to the statutes that they rely upon, let our defense be geared to one statute.

[fol. 11] Now, don't have us groping about in the dark as to which or what we are defending against and so forth. I don't know that there are any inconsistencies actually, but there is just slightly the possibility here, we feel that justice demands that this man be prosecuted, if at all, only under one offense, unless he has committed more than one offense, and that is all that the warrant charges. I don't get the impression that it is the position of the City that he has committed more than one offense; that being the case, we are to defend against only one defense.

The Court: Do you have anything else you want to say?

Mr. Spencer: May it please the Court, it is the position of the City that the matters now raised by counsel have already been once presented to this court in a preliminary motion, and once decided adversely to the position of the defense counsel. The amendment to the warrant has not in any manner changed what law is or is not applicable, or what law does or does not establish an offense of trespass. Furthermore, as counsel for the defendant have indicated that they will understand, the City does not seek to convict the defendant of any more than one offense of trespass, based upon the circumstances presented in the warrant. The City simply takes the position that whatever, if any, law prohibits that which the defendant has done is properly applicable to him in the trial of this case, and that if the facts as proved make the offense out under any one of, or under all of, the particular sections to which reference has been made, that in such offense, and that in such event, the defendant is then properly to be found guilty of one offense of trespass and only one, and without reference necessarily to what [fol. 12] particular statute or ordinance he is charged under.

Now, Your Honor, Section 43-114 of the State Code provides that whenever a person be accused of committing an act which is susceptible of being designated as several different offenses, the Magistrate upon trial of the person shall be required to elect which charge to prefer, and a conviction or acquittal upon such elected charge shall be complete bar to further prosecution for such alleged act.

Now, as I know Your Honor will recall, we recently had another situation in this Court in which one or more defendants were charged on the one hand with breach of the peace, and on the other hand with trespass, and in that case, the City made an election and went to trial on only one offense. Now, we submit that we are not seeking here to go to trial on but one offense, to wit, the offense of trespass, and that the whole body of the law of trespass is applicable to that one offense without the necessity of any election on the part of the City of Rock Hill.

Indulge me just one moment, Your Honor. May it please the Court, I do not find at the moment what I was

looking for, although I believe that there is authority, and I will simply state the position and Your Honor can consider it when ruling upon the matter.

It is my understanding of the law that actually on this question of amendment to the warrant, that it can be amended before trial, that in addition thereto that there can be an amendment during the process of the trial which does not change the basic nature of the offense charged, and does not create any situation of surprise with reference to the defendant. Now, if that be the law, I submit to Your Honor that to require an election now would serve no purpose, because if there [fol. 131 became, if there arose any necessity thereupon, I could later move to amend them, and to conform proof, and to go along with any one of the three provisions that we have mentioned specifically that were being relied upon.

I offer that one further comment in support of the City's position that the warrant as drawn is in proper status, and that we are not subject to requirement to make an election at this time.

The Court: Well, there is no rush about that; I think you will find it under Title 46, Section 18, somewhere in that neighborhood. I think the warrant informs the defendant of what he is charged with, and any additional attempt to try him on the same set of facts, I don't think there would be any question about it, but that that would be double jeopardy, and during the course of the trial if there is anything brought out which would be in the nature of a surprise to you, if you will let us know at that time, we will hear you.

All right, bring the jury in, please.

All right, then, we will note that Mr. Mozingo has been elected foreman by the remaining jurors, and I will appoint him foreman of this jury.

Well, all right, are you ready to proceed, Mr. Spencer?

Mr. Spencer: May it please the Court, the City is ready to proceed. I believe we have not yet entered in the record what we have done in certain other cases, and that is to state that it has been agreed by defense counsel that the defendant is responsible for the cost of taking of the testimony and any copies sought thereof.

Mr. Perry: That is our position, sir.

The Court: All right. Do you want to swear all your witnesses at one time?

[fol. 14] Mr. Spence: No; swear these right here that are sitting there, Mr. Hunsucker and Mr. Barnette.

The Court: (Witnesses sworn).

MR. JOHN M. HUNSUCKER, being first duly sworn, was examined and testified as follows:

* Direct examination.

By Mr. Spence:

Q. Mr. Hunsucker, will you, are you a member of the Police Department of the City of Rock Hill?

A. I am.

Q. And what is your present capacity with the Department, sir?

A. Assistant Chief of Police, Captain.

Q. Did you hold this same status on June 7, 1960?

A. I did.

Q. Mr. Hunsucker, how long have you been a member of the Police Department?

A. Since February of 1948.

Q. I ask you, do you know the defendant, Reverend C. A. Ivory, in this case?

A. I do.

Q. Mr. Hunsucker, did you on the 7th day of June, 1960, have occasion to see the defendant, Reverend C. A. Ivory, at any time?

A. I did.

Q. Will you state when and where you saw him? On that date?

A. About eleven forty-five a. m. on Tuesday, I was at headquarters and received information that I should go to McCrory's dime store to the lunch counter. I went to this lunch counter along with Detective Barnette, and as I arrived at the lunch counter, I saw the defendant, Reverend [fol. 15] Ivory, at the corner of the lunch counter, pushed,

that is, he was in his wheel chair, and the wheel chair itself was pushed right into the corner of the lunch counter between the stools at the lunch counter.

Q. All right, sir, you state that from your observation, was he alone or was anyone with him?

A. He was with Arthur Hamm, who is a colored student at Friendship College.

Q. All right. Where was the man you refer to as Arthur Hamm?

A. Well, let me say this, there are three stools at the end of the lunch counter at McCrory's, and Arthur Hamm was seated on the center stool, the center of those three stools. There was a vacant stool between Hamm and Reverend Ivory, who was on the corner of the lunch counter, or seated at the corner of the lunch counter.

Q. I will ask you to state whether or not he was seated between the last stool in running with the store, and the end stool running crossways in the counter; is that correct?

A. Reverend Ivory was seated at that position.

Q. All right, now, at the time you saw Reverend Ivory, I will ask you whether or not you also saw the manager of McCrory's store?

A. I did.

Q. And can you identify him by name?

A. Mr. Whiteaker is manager.

Q. Where was he at the time you saw him?

A. He was behind the counter, facing Reverend Ivory and Arthur Hamm.

[fol. 16] Q. Did you observe whether or not any conversation took place between Mr. Whiteaker and Reverend Ivory?

A. I did. I heard the conversation.

Q. Will you state to the Court just what was said by each of them?

Mr. Perry: Your Honor, we object to the question on the ground that it calls for hearsay testimony. The witness has already pointed out Mr. Whiteaker, who is present in the courtroom, and, of course, as Your Honor knows, the defendant was present. As to matters of con-

versation between other persons, we feel that this witness would not be competent to testify.

Mr. Spencer: If it please the Court, it is the position of the City that the conversation took place in the personal presence of the defendant, and is in the realm of an exception to the rule on hearsay.

The Court: It did take place in his presence, Mr. Spencer?

Mr. Spencer: Yes, sir, this is a conversation between the defendant and the store manager.

The Court: Between the store manager and the defendant. It is acceptable. Go ahead.

By Mr. Spencer:

Q. All right, Mr. Hunsucker, will you proceed to answer the question.

A. Mr. Whiteaker told Reverend Ivory and Arthur Hamm that he was sorry that he could not serve them, he would have to ask them to leave the lunch counter. Reverend Ivory stated that he wanted a refund for some articles which he had in his possession, and Mr. Whiteaker told him that, told Reverend Ivory, that he would have to go to the check-out counter in order to get his refund. At this time I told the Reverend Ivory that, "You have heard [fol. 17] the request of Mr. Whiteaker, so I will ask you to leave the lunch counter, or else you will be arrested for trespassing."

Then Reverend Ivory started talking about his refund, and again he was advised by Mr. Whiteaker that he could get the refund at the check-out counter.

Q. Did he agree to go to the check-out counter to get his refund?

A. He did not. He made no effort to move from the lunch counter, and neither did Arthur Hamm. They both stayed in the same position that they were when I first arrived, neither had moved; so at this time, after neither one of them made any effort to move, I placed them both under arrest, and Detective Barnette took custody of Arthur Hamm; I took Reverend Ivory, who was in the wheel chair, I pushed him back to the check-out counter, and gave him an opportunity there to get a refund.

Q. What, if anything, transpired with reference to the refund at that time and place?

A. I asked the lady at the check-out counter would she refund Reverend Ivory's money for these items, and she stated that she would be glad to refund. By this time Mr. Whiteaker had also come up, and Reverend Ivory said, "No, I don't want a refund, I will sue McCrory's and the City." So he refused his refund, and I pushed him around then to be booked at the Police Department. I brought him to the booking window, removed his property, he had sufficient money on his person to post the \$100.00 bond which was placed against him.

He stated that he did not want to post bond, that he wanted to go to jail. So that is where I was going to put him.

[fol. 18] Mr. Perry: Your Honor, may I interrupt, please. May I object to conversation between the defendant and the police after they arrived here at Police Headquarters. The warrant charges a trespass. It does not charge any offense which occurred at the Police Station, and we take the position that it is irrelevant to the charge of trespassing.

Mr. Spencer: May it please the Court, it is the position of the City that it is part of the circumstances of the arrest for which the defendant is being tried, and is therefore definitely relevant, and pertinent, and proper, and we are not seeking to make out any additional offense, but simply to give all of the circumstances with reference to the offense, which is now on trial.

Mr. Perry: Now, by way of reply, may I say, sir, that this jury is being asked by the City to convict this defendant of the crime of trespass. To allow evidence of some conversation that occurred here at Police Headquarters after he was placed under arrest for the offense would be to prejudice them. We respectfully submit that this evidence will deprive the defendant, we believe, of an impartial trial, in that these gentlemen of the jury would be called upon to consider what we think would be foreign matter.

Now, if somehow a conclusion is reached, which did not happen, it might very well be that the City can call

upon Captain Hunsucker to state any attitude which might have existed after the arrest to Your Honor, and Your Honor could take it under consideration before you took official action.

I hope that you see what I am driving at, sir.

The Court: I do, but isn't trespass a matter of intent?
[fol. 19] Mr. Perry: I believe it is a matter of intent, but I also think that principally the jury should be allowed to consider only what he did at the time. Foreign matter should not be allowed to cloud up the issues.

The Court: Well, I won't make a blanket ruling, but I will permit the present questioning and answers,

By Mr. Spencer:

Q. Mr. Hunsucker, other than the matter of refund, to which you have already referred, did Reverend Ivory state any cause or reason or excuse for his refusal to leave the premises on demand in your presence?

A. No, sir.

Q. Was he given ample opportunity to leave if he had been willing to do so?

A. Oh, yes.

Q. Was that opportunity afforded to him before he was placed under arrest?

A. It definitely was.

Q. Did he fail and refuse to take advantage of that opportunity?

A. He did.

Q. Did that occur without the statement of any cause or excuse other than this reference to the refund?

A. I am sorry, I didn't understand the question.

Q. I say, did that occur without a statement of any cause or excuse, other than the reference to the matter of the refund, was any other statement made?

A. No, sir, no other statement other than about the refund.

Q. Mr. Hunsucker, I will ask you to state whether or not the manager of McCrory's store in your presence ordered the defendant to leave the premises?

[fol. 20] Mr. Perry: Your Honor, that is repetitious. He has already testified.

Mr. Spencer: If counsel will agree that it is already in the record, I will be glad to withdraw the question. I just wanted to be sure.

Mr. Perry: Yes, sir, we do.

Mr. Spencer: If counsel so agrees, I withdraw the question. You may examine him.

The Court: He said the question was in there, but he didn't say what the answer was.

Mr. Perry: Well, the truth of the matter is, the answer is, sir.

The Court: All right. I recall that the Captain did testify to the answer.

Cross examination.

By Mr. Perry:

Q. Captain Hunsucker, do I understand, sir, that you were here at Headquarters on the morning of June 7th, and received information that you should go to McCrory's?

A. That's right.

Q. I see. May I ask you, sir, the source of your information?

A. I am not positive, I believe that the dispatcher is the one that gave me the information, but I am not certain. It could have been another officer.

I was in the Detective Department, and the information was given to me from the doorway, to go to McCrory's lunch counter.

Q. I see. Now, sir, the did you learn from the source of your information what you would find when you went over to McCrory's?

[fol. 21] A. I was asked to go to the lunch counter at McCrory's dime store.

Q. I see. Now, when you went into McCrory's, which entrance did you go into?

A. The rear entrance.

Q. The rear entrance, and as I have discovered just this morning, I believe McCrory's is just close by to the Police Station here, just across the parking lot?

A. Just across the lot, the rear entrance.

Q. And you went into the rear. Now, sir, when you went in the rear door, did you come upon a lunch counter there?

A. They had a small place there, I believe, where they sell hot dogs, and maybe drinks, actually I don't think you could refer to it as a lunch counter, but hot dogs and drinks are sold there, I know that.

Q. I see. I believe that is a rather small area at the rear of the store, isn't it?

A. That's true.

Q. Was the defendant at this lunch counter?

A. No, he was at the front lunch counter.

Q. I see. McCrory then has two lunch counters, one at the rear back here near the Police Department, and the other over near the front on the street, which the store fronts on?

A. They have two places where food can be bought, yes. They have the counter in the front with the stools, and then this place at the back which we were referring to, which has no stools.

Q. I see. Then as I understand you, you do not refer to that one in the back as a lunch counter as such?

A. Well, you can buy lunch there.

Q. And I believe that you indicated that this was on a Tuesday morning at about 11:45?

[fol. 22] A. Approximately 11:45.

Q. Will you please describe McCrory's business, is it generally a variety store, or a five and ten cent store?

A. It is a variety store.

Q. I see. Do you have any idea about the size of this business concern?

A. Not much.

Q. In area is it rather large, a rather large business?

A. In area, yes.

Q. Do they sell numerous commodities in this place of business?

A. They do, sir.

Q. I see. Captain Hunsucker, have you on other occasions frequently been in and out of McCrory's?

A. I have.

A. Sir, do you know anything about the policies of McCrory's Five and Ten Cent Store with reference to serving the public?

Mr. Speneer: May it please the Court, I submit that, that there is nothing in the record which, to which that question is properly responsive, and that there is nothing in the offense charged which goes into that question, and I therefore object to the question, and ask that the question be stricken, and that the witness not be required to answer it.

The Court: He asked him if it was the policy, if he knew the policy, didn't he?

Mr. Spencer: Yes, sir, but the point I am making is that the question of policy of a nation-wide store, is, as I have said; not an element that is involved in anything that is now before the Court in the trial of this case, in the record of this case.

[fol. 23] Mr. Perry: May Your Honor please, we take the position, of course, that it is quite relevant, and that were it not for the racial background in this case, that this defendant would not be in Court on this occasion.

Mr. Spencer: Furthermore, I question whether or not this witness is properly subject to examination on what somebody else's policy is. I think you are putting the witness in an improper position, to call upon him to try to testify on that sort of subject. That is primarily—

The Court: Of course, if he knows of his own knowledge, he has a right to answer.

Mr. Perry: He certainly is one of the most intelligent officers I have ever had occasion to come in contact with.

The Court: I don't find anything wrong with the question.

A. I can't say that I know anything about their policy.

Q. All right, sir.

A. Now, if you want, I can't say about their policy, because I just definitely don't know what the store's policy is, what is customary.

Q. That is quite all right, sir, that is frankly all I wanted to know, whether you knew what the policy was. Now, sir, you also made reference just then about a custom which might affect this situation. Will you describe that custom?

A. Are you speaking in reference to races at the lunch counter?

Q. I am, sir.

A. I can only say that I have never known of any members of the Negro race being served at this lunch counter. I have never seen any served.

[fol. 24] Q. You have reference, of course, to the lunch counter that Reverend Ivory was seated at?

A. That's right.

Q. And you do recognize Reverend Ivory as a Negro?

A. That is correct.

Q. I realize, sir, that we are involved in a rather touchy matter, and I have no desire nor intention to ask you any embarrassing question, and I hope that you will bear with me, sir. Now, sir, when you went in the store, I believe that you saw Reverend Ivory seated down at the counter, and I believe that you have stated that Mr. Whiteaker, the manager, was on the inside of the counter area, having a conversation with Reverend Ivory?

A. Well, he had a conversation after I arrived.

Q. I see.

A. At the time I walked up, actually I don't think they were actually engaged in conversation at that particular time, but as I did arrive, Mr. Whiteaker asked him what I have already stated.

Q. Now, was Reverend Ivory boisterous in any manner as you observed the two men?

A. No, he was not boisterous.

Q. Was he orderly in every respect except for the refusal to leave?

A. As far as I know and could see, he was.

Q. Did he use any profanity or unseemly language?

A. No.

Q. Was he dressed neatly and was he generally inoffensive in his presence?

A. He was.

Q. Are there, were there at that time other persons seated at the lunch counter?

[fol. 25] Q. A. There were.

Q. Other than these two persons?

A. There were.

Q. May I ask you, sir, where were they?

A. There was no other person at the end where they were; on the three stools which I have mentioned. There were other persons seated on the long row of stools, main row or front row or whatever you want to call it.

Q. I see, and were these people being served?

A. I guess they were, I didn't actually pay any attention to whether they were being served. I feel sure they were.

Q. You feel sure they were? May I ask you to describe the racial identities of the other persons that you saw seated at the lunch counter?

A. White persons.

Q. I see. And as you stood there and heard the conversation between the store manager and Reverend Ivory, I believe that you indicated that the store manager asked Reverend Ivory to leave, that he could not serve him, or words to that effect?

A. That's right.

Q. I know you have already said that his conduct was inoffensive, and that his appearance was inoffensive. Do you know why the manager was asking him to leave?

A. You asked about his dress, asked if it was neat, and I stated yes. Do I know why he asked him to leave?

Q. Yes, sir.

A. He will have to answer that. He just asked him to leave, is all I can say.

Q. I see. Did I understand in your presence Mr. Whittaker made the request to leave only once?

[fol. 26] A. I believe he requested him to leave twice, sir, in my presence.

Q. You believe, now, are you saying that definitely, sir, or—

A. Let me see. He made the request at first, when I first walked up, and then a second request was made, yes, it was, before Ivory was arrested.

He was asked to leave when he was going to the check-out counter to get a refund.

Q. I thought I understood your testimony a moment ago to be, sir, that when you arrived the manager told the

defendant that he could not serve him? That he could not be served?

A. That's right. He said, "I am sorry, I cannot serve you."

Q. Yes, sir. And if I understand your testimony, sir, you quoted from the defendant as saying that, in that event, "I would like to have a refund for the articles which I have already purchased," or words to that effect.

A. He did.

Q. And as I followed your testimony further, I believe that you stated that you said to the defendant, "You heard what the manager said, you will have to go."

A. That's right.

Q. Now, as we refer to that portion of your testimony, sir, do you recall that one request was made or two requests were made?

A. I still say that Mr. Whiteaker made two different requests for Reverend Ivory to leave, and I made one request.

Q. I see, all right.

[fol. 27] At that time, was there any conversation between you and Mr. Whiteaker?

A. I believe I asked Mr. Whiteaker could Reverend Ivory get his refund, or words to that effect, during this conversation, and he advised that he could get it at the check-out counter. I believe that—

Q. I see. Now, is it your recollection that you asked Mr. Whiteaker this before you asked Reverend Ivory to move, or after you had asked him to move?

A. I am not certain. I am certain it was said, but I am not certain whether it was before or after.

Q. I know that you want to be honest, sir, and I have no intention of trying to invoke you to be anything but that way, but I will ask you consider, if you can, and if possible we would like to get an answer to that question.

A. Well, I certainly don't want to answer it wrong.

Q. We certainly don't want you to, and I apologize if I have been overbearing on that point. But in any event, your first conversation with Mr. Whiteaker was an inquiry as to whether Reverend Ivory could get a refund?

A. As well as I recall, that was our first conversation, yes, sir.

Q. I see. This being the case, of course, you at that point were actually volunteering your services as an officer of the City of Rock Hill in this situation?

A. After he had made no effort to leave, after being asked by the manager and myself to leave, I thought he was violating the law.

Q. May I ask you, sir, are you conscious, being the intelligent officer that you are, are you conscious of any statute in this state or in this city of which you are Chief of Police, are you aware of any statute which would prevent McCrory's from serving Reverend Ivory at its lunch counter?

A. No, I am not.

Q. And so, as you were present on the premises of McCrory's at this time, you were not at that time enforcing any State law with reference to McCrory's policy of service to Negroes, were you?

A. No, I was not.

Q. Yet you are aware of a custom, I believe you indicated in your replies that you don't know whose custom it is, but you are aware of a custom, the result of which does not permit Negroes to be served at these lunch counters?

A. Customarily they are not, no, sir.

Q. Well, now, sir, being aware, as you were, of that custom, was not your act at that moment made in full realization of the custom which you say exists?

A. Well, let me say this. It is my duty to enforce the law and not the custom. After he refused, or made no effort to leave, I thought that he was violating the trespass law, and arrested him for such.

Q. I see.

And knowing, of course, I believe your testimony indicates that this defendant did have other packages which his conversation indicated that he had purchased in some other department of the store, did you know that?

A. I saw the packages.

Q. You saw the packages, and so you knew that he had been served in some other department in the store?

A. I did not. I didn't see him served in any other department. I saw the packages, and I heard the conversation about the refund, but he did not buy them in my presence.

[fol. 29] Q. All right, sir. As I recall, after you left the lunch counter, and reached an area where someone offered him his money back, did I understand you to say that he didn't leave the lunch counter very far behind, may I ask you to repeat your testimony, how far from the lunch counter was it that the conversation with reference to return of the money took place?

A. I don't believe I stated before, but the check-out counter, as they tell me it is called, where he could receive the refund, in back towards the rear of the store, and actually it is at the end, that is, if you would enter the back door of the store, it would be at the end of the first counter, that is, on the far end going toward the lunch counter.

Q. Captain Hunsucker, were you requested by Mr. Whitaker to place Reverend Ivory under arrest?

A: I was not.

Mr. Perry: Thank you very much.

The Court: Do you have any other questions?

Mr. Spencer: Yes, Your Honor.

Redirect examination,

By Mr. Spencer:

Q. Mr. Hunsucker, you were asked on cross examination whether you were aware of any statute which would prohibit McCrory's store from affording lunch counter service to Reverend Ivory as a member of the Negro race, and you answered in the negative, and I now ask you if you are aware of any statute which would require McCrory's to provide lunch counter service to Reverend Ivory, a member of the Negro race?

A. I am not.

[fol. 30] Q. Mr. Hunsucker, I will ask you also to state whether or not you have arrested and charged with tres-

pass any member of the Negro race for sitting at this lunch counter or any other similar counter in this city in the case in which you have not first heard or observed an order to such person by the manager or person in charge to leave the premises?

Mr. Perry: Your Honor, I object to that, Your Honor.

The Court: On what basis?

Mr. Perry: If I understand the question correctly, I believe that it has something to do with other occasions during which the witness may have been called upon to take official action.

The Court: He asked him if he had ever arrested anyone sitting at the lunch counter, if the store manager had not asked him to leave prior thereto, isn't that your question?

Mr. Spencer: That is correct, and I submit that it is directly responsive to the line of cross examination in which I submit certain questions were asked, I assume for the purpose of testing whether or not the witness was enforcing the law with bias, and I say that these questions are designed to bring out the City's position, and I say that that was not the case.

Mr. Perry: Our position, sir, is that any other arrest that the witness might have made at this or any other lunch counter could have no bearing upon the activities of June 7th, at which Reverend Ivory was arrested, and we take the position that the inquiry is irrelevant, and calls for an irrelevant answer.

The Court: I don't think so, in view of the questions you asked him on cross examination. I will permit the question.

[fol. 31] A. Give me the question again, please.

The Court: He asked you in effect if you had ever arrested anybody else for sitting there, unless the manager had asked them first to leave, isn't that the question?

Mr. Spencer: That is correct.

A. I personally have never arrested anyone else there, sitting at the lunch counter.

Q. I have no further questions. The witness will come down.

The Court: Do you have any further cross examination?

Mr. Perry: Nothing further.

The Court: Witness excused.

(The witness excused.)

The Court: All right, next witness.

Mr. Spencer: Mr. Harry S. Barnette.

Mr. Perry: May we inquire what is the preference of the Court with reference to the lunch hour?

The Court: All right. Mr. Foreman and gentlemen of the jury, I want to caution you that during lunch you will go and eat where you wish to eat. We are not going to keep you together, but I ask that you do not discuss this case with anybody, not even among yourselves.

I don't want you to read about it in the newspaper, and I don't want you to listen to it on the radio, I don't want you to listen to it on television, and be back at—I have about ten minutes after one; be back in your seats at two-fifteen.

(Off the record.)

[fol. 32] (Thereupon, at 1:10 p. m., a luncheon recess was taken until 2:15 p. m. this day.)

(Afternoon session.)

The Court: On the record.

MR. H. S. BARNETTE being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Spencer:

Q. Mr. Barnette—

The Court: Does the defense waive polling of the jury?

Mr. Perry: Yes, sir.

The Court: Mr. Spencer, would you?

Mr. Spencer: Yes, Your Honor.

By Mr. Spencer:

Q. Your name is Harry S. Barnette?

A. Yes, sir, that is correct, sir.

Q. Mr. Barnette, you are a member of the Police Department of the City of Rock Hill?

A. I am.

Q. How long have you served as a member of the Police Department?

A. Since May 1, 1947.

Q. In what capacity do you now serve?

A. Sergeant of Detective Division.

Q. Were you serving in that capacity on June 7, 1960?

A. I was.

Q. Do you know the defendant, Reverend C. A. Ivory?

A. I do.

[fol. 33] Q. Did you have occasion to see him at any time on June 7, 1960?

A. I did, sir.

Q. Will you indicate the time and the place?

A. About 11:45 a.m., we received a call, I believe the desk sergeant is the one that informed Captain Hunsucker and myself in the Detective Division that we were needed at the McCrory's dime store.

Q. All right, did you go to the store in response to that information?

A. I did.

Q. And when you reached there, did you see the defendant, Reverend C. A. Ivory?

A. I did.

Q. At what point in the store was he when you first saw him?

A. He was seated in his wheel chair at the rear of the lunch counter at the front of the store.

Q. You say the rear of the lunch counter at the front of the store. I ask you, are there two counters, are there two places in the store where food service may be obtained?

A. There are.

Q. And is one at the front and one at the rear?

A. Yes, sir.

Q. And you say that this was at the forward counter?

A. That is correct.

Q. All right, now, will you describe the exact point or location at that particular counter?

A. Reverend Ivory was seated in his wheel chair at the counter, between the two vacant stools, Arthur Hamm was seated one stool, there was a vacant stool between Arthur Hamm and the Reverend Ivory.

[fol. 34] Q. Did you at or about the same time have occasion to see the manager of McCrory's store?

A. I did.

Q. Can you identify him by name? And if so, what is his name?

A. Mr. Whiteaker.

Q. And where was Mr. Whiteaker at the time you saw him?

A. He was at the rear of the counter, or on the inside of the counter.

Q. Did you observe whether or not any conversation took place between Mr. Whiteaker and the defendant, Reverend C. A. Ivory?

A. After Captain Hunsucker and I, we got to the counter, Mr. Whiteaker asked Reverend Ivory to leave, that he could not serve him.

Q. And this occurred in your presence, did it?

A. That is correct.

Q. Were you able to hear exactly what was said?

A. Yes, I did.

Q. All right, you have stated that Mr. Whiteaker asked Reverend Ivory to leave. What, if anything, did Reverend Ivory do or say responsive thereto?

A. Reverend Ivory nor Arthur Hamm, neither one, made any attempt to leave, and at that point Captain Hunsucker asked him if he understood what Mr. Whiteaker had told him, and then he repeated what Mr. Whiteaker said, and that was that he could not be served, that he would have to leave the counter.

Q. All right. Did he leave?

A. He did not.

Q. Did he make any statement or give any reason or explanation about the matter of leaving?

[fol. 35] A. No, he did not. At that time he did get a package that was on the floor, and put it on a stool between he and Arthur Hamm, and asked Mr. Whiteaker for a refund, if he could not be served, then he wanted the refund.

Q. What, if anything, did Mr. Whiteaker say in response thereto?

A. Mr. Whiteaker pointed out that the check-out counter at the rear of the store, asked him to go there and get the refund.

Q. All right, did Reverend Ivory agree to go there and get his refund, or did he refuse?

A. He made no attempt to move, either he or Hamm.

Q. What, if anything, transpired next thereafter?

A. At that point Captain Hunsucker pointed out the check-out counter also, and told him that he could receive his refund for his packages at that place.

Q. All right. Did Reverend Ivory continue to remain at the same location or not?

A. He did.

Q. And what if anything occurred thereafter?

A. Captain Hunsucker told him if he would not leave the lunch counter, that he would be placed under arrest for trespassing.

Q. And after he was told that, did he leave or did he continue to stay there?

A. He did not.

Q. Was he then placed under arrest?

A. At that point he was placed under arrest.

Q. All right, now, did you observe what occurred from that time forward with reference to this defendant?

A. At that point I arrested Arthur Hamm, and came out the back door of the store onto the Police Station.

[fol. 36] Q. All right, what if anything did Captain Hunsucker do?

A. The next time that I saw Captain Hunsucker and Reverend Ivory was in the Detective Division.

Q. All right, did you observe whether or not he placed Reverend Ivory under arrest before he left the store?

A. That is correct.

Q. And then you left?

A. And he was turned around in the direction to head out the rear of the store, and that is the last time that I saw him until I saw him here in the station.

Q. Then were you here in the station when Reverend Ivory was brought in by Captain Hunsucker?

A. I was.

Q. Did you observe what, if anything, was done or said by Reverend Ivory at that time?

A. Reverend Ivory and Arthur Hamm were both taken to the Detective Division.

Mr. Perry: I would like to impose the same objection here, which was imposed to this line of testimony which was given by Captain Hunsucker, that is with reference to conduct of the prisoners after they arrived here at the jail.

The Court: For the same reason I will overrule it.

By Mr. Spencer:

Q. All right, you may proceed. Answer the question.

A. The information was received from them on their arrest slips, and at that point they were brought to the Desk Sergeant, and booked.

Q. All right.

A. And in checking their property in with the Desk Sergeant, they were advised of the charge and the amount of the bond.

[fol. 37] Q. Were they then placed in confinement?

A. Arthur Hamm at that point was, Reverend Ivory at that point, I believe, was, he asked Captain Hunsucker for the use of the telephone, which he was allowed to use it.

Q. Now, other than the matter of the refund question that was raised by Reverend Ivory, did he give any cause or excuse or did you see or observe any reason why he could not have left the store when directed by the manager to so do?

A. I did not. I couldn't see any excuse; or he didn't let us know if there was any.

Q. He appeared to be free to go, if he had been willing to do so, did he?

A. In my opinion, yes.

Q. And did he or not give any reason for not going, other and aside from the question of the refund which he requested?

A. That is the only thing I heard.

Q. And I believe that you stated that he declined to go to the check-out counter for the purpose of getting a refund, or failed to do so, is that right?

A. That is correct.

Q. I have no further questions. You may examine him.

Mr. Perry: Would you indulge us just one moment, please, sir?

The Court: Yes.

Cross Examination.

By Mr. Perry:

Q. Mr. Barnette, just one or two questions, please. Do I understand that you had the same source of information which Captain Hunsucker testified earlier that you were to go over to McCrory's?

[fol. 38] A. That is correct.

Q. All right, sir, the same person who told Captain Hunsucker also told you?

A. Correct. We were together at the time.

Q. I see. And did you know as you were proceeding toward McCrory's what you would find when you arrived there?

A. I do not know what we would find.

Q. I see, you were simply told that you should get over to McCrory's?

A. That is correct.

Q. Now, Captain Hunsucker testified at length this morning, as you have, concerning the series of events as he discovered them there. Now, Captain Hunsucker, is, I believe, Assistant Chief?

A. That is correct.

Q. There are, I believe, two chiefs, one of the police and one of detectives?

A. That is correct, sir.

Q. I see, and may I ask you again, sir, what is your official position?

A. Sergeant of the Detective Division.

Q. Now, Captain Hunsucker stated in his testimony this morning, if I recall correctly, that he had heard the conversation between Mr. Whiteaker and Reverend Ivory, and that he heard Mr. Whiteaker tell Reverend Ivory that he could not serve him. I believe your testimony substantially is the same on that point?

A. The same.

Q. Now, Captain Hunsucker later did not recall whether Mr. Whiteaker made this statement once or twice, so I made no point about it here. My question, sir, is this, as to your next item of testimony, you said that Captain Hunsucker then said to Reverend Ivory, "Did you understand what [fol. 39] Mr. Whiteaker said?" as I understood your testimony a moment ago.

A. I believe that's what I said.

Q. Now, Mr. Barnette, Captain Hunsucker said on this morning that after Reverend Ivory refused to move for Mr. Whiteaker, that he, Captain Hunsucker, then told Reverend Ivory that he would have to leave. Now, sir, I would like to just briefly ask, how is it that two very able police officers such as you and Captain Hunsucker can vary on that little detail?

A. I don't see any variation there, because I think, I believe that you came back more or less the way that I did.

Q. Yes, sir, as I understood your testimony, it was that Captain Hunsucker asked him whether he understood Mr. Whiteaker?

A. That is correct.

Q. Captain Hunsucker testified that he told the Reverend Ivory, "You will have to go."

A. If I understand correctly, Captain Hunsucker's statement there was that when we walked up to the counter, Mr. Whiteaker asked Reverend Ivory and Arthur Hamm to leave the counter, that he could not serve them. At that time Reverend Ivory nor Hamm made any attempt to leave, at that point is when he asked him if he understood what Mr. Whiteaker had said, and then repeated that.

Q. I see. All right, sir. Now, of course, you recognized as Captain Hunsucker did, that there were some other people, white people, sitting at the lunch counter?

A. That is correct.

Q. Were any of them asked to leave?

A. Not in my presence.

[fol. 40] Q. I see. Well, as between you two officers, are you able to say which of you was more or less in charge, if such was the case at that time?

A. At the time, Captain Hunsucker was in charge, because I had nothing to say whatsoever after he instructed him.

Mr. Spencer: Nothing further. Mr. Barnette, will you come down?

(Witness excused.)

Mr. Spencer: If it please the Court, the City has certain other witnesses under subpoena, but upon consideration of the testimony which is already offered, we believe that upon the issues and the only issues which are directly involved, such testimony would be cumulative, and therefore the City will close at this time.

The Court: You may proceed.

Mr. Perry: Would Your Honor indulge us just a moment, please, a short recess?

The Court: Yes.

(Recess taken.)

The Court: On the record. Are you ready to proceed?

Mr. Perry: We have one or two motions at this time, Your Honor.

The Court: I would like to excuse the jury again while I hear the motions.

(Jury temporarily excused.)

The Court: All right, you may proceed, sir.

COLLOQUY ON MOTIONS FOR A DIRECTED VERDICT AND FOR
JUDGMENT OF ACQUITTAL

Mr. Sampson: May it please the Court, we would like to move the Court to make a motion for a directed verdict in two parts, one by myself and one by Mr. Perry, and we will try to be as brief as we can under the circumstances.

[fol. 41] We would like at this time as one of the reasons for a motion for directed verdict to renew our motion that based on the evidence that the State has now put in, at the close of their case, we still do not know and we do not feel that the State has made out a *corpus delicti* or a *prima facie* case under either of the three statutes. We feel that the statute of the City of Rock Hill is substantially like the statute of the State, to wit, Section 16-386, and the subsequent amendment shown in the 1959 supplement, and therefore for the purposes of this motion we will talk about the statute of the City of Rock Hill, and 16-386, with the amendment, as if they were one, though in fact they are not one, and we would like to note at this point, however, that even if the City of Rock Hill were proceeding independently under its own statute, where it exercised by reason of its police power as a municipality as distinct from whether or not it may or may not have gotten it from the State, or by inference, or so forth, that our position would be that they still have not made out a *prima facie* case, or the elements of a *corpus delicti* have not been made out.

Moreover in that connection our position would be that those two statutes as well as the recent statute, recent law, rather, of May 16, 1960, would be unconstitutional.

Addressing the Court to the offense of trespass, we are not going to try to take it on ourselves to carry the burden of explaining the fact of what is trespass, because that is really the responsibility of the Court, but we say with reference to it, that we have that in mind, generally speaking we take the position that trespass would be the unlawful invasion of property rights of another, a very general proposition, and we submit that technically the common law, except for very limited areas, that there was no criminal action of trespass; and we take the position

that the law in this State shows that except in very narrow areas, strictly, where the law will not take care of cases, but where about larceny and so forth, or had not properly been made out, and possibly in that area, and one or two others, that there was technically a trespass under the criminal law.

Now, as the Court knows, there is a tremendous amount of law on the books; on the civil side of the law of trespass there are sundry things, primarily common law, and even now a violation of the law of trespass is primarily a civil matter, as distinct from a criminal matter, and we note with some regret that even among people who write the encyclopedic law, as would be in *Am. Juris.* or *Corpus Juris.*, that this is the latest work here, and we note that there are about four pages, not more, in summary, of the entire law, of criminal liability on the law of trespass, as distinct from almost a chapter on civil law; therefore we think that since this is a criminal matter, and because of the history of the law of trespass and so forth, that in order to properly make out a case of trespass under the criminal statutes, that it is an extremely narrow matter, and now, without being verbose about it, we think that where the law is, that where there has been a statutory attempt to make a trespass a criminal sanction as distinct from a civil sanction, our position is that the law is without question usually the alleged trespass must be accompanied by the elements of willfullness, force, or malice, or such conduct as may or may not create a breach of the peace.

Usually you have profanity, fighting, and that kind of thing. We state that that is what the law is. Now, in reference to that particular point in the State's evidence in this case, we think that the evidence does not sustain any [fol. 43] element of willfullness, force, or malice, or anything which would normally be disorderly conduct or which would even normally be breach of the peace.

We think that that testimony is clear, that there was no crowd, no disturbance, as I understood their testimony a number of people didn't even know the incident was going on as such. We think that the testimony will show that the State's evidence, that Mr. Barnette admitted that this

package, and Captain Hunsucker testified also that the defendant in this particular case had items of merchandise on or about his person which indicated that he had at a moment or two before the alleged conversation, which led to his arrest, had actually purchased items as a vendee or as a business invitee in this said store.

We think that it is important that this case be judged on the fact that apparently it is a variety store, with a multiple number, apparently, of departments and counters; that this, that the place of this alleged incident had occurred within an aisle's width, so to speak, from an area apparently which the alleged defendant there could easily have spent one dollar or a hundred dollars or a thousand dollars in; and apparently from the testimony, that the State has put up, we have here a charge of trespass allegedly growing out of the department of the variety-type store, dedicated to the public, where the defendant is a business invitee, and where it is admitted that he could have spent any number of dollars at other departments in and about this particular area; that the defendant, that apparently one of the agents or owners of the store, whoever called the police here, assuming that they did it voluntarily, so far as State action we hope not, we will find that out later, that the defendant, the witness for the state who apparently sent this information in, had just gotten through treating this [fol. 44] particular defendant here as a business invitee, according him all of the courtesies that he may or may not have wanted in other departments of this store; that he advertises, that he had apparently from the State's case as I understand it at this point, there is no question of any notice being given the defendant, as I understand the testimony at this point, there was no posting of notices, there was no newspaper advertisements at all here.

Now, Mr. Spencer for the City says that this action is barred under 16-386. I don't want to prolong this, but the Court, I think, perhaps is familiar with the section; if not, I have it here; I don't want to read it, but I almost have to, because the legislative intent of this particular statute does not, would not, could not be properly used to make out a *prima facie* case or a case of *corpus delicti*.

trespass in this particular situation, under these circumstances.

Aside from the fact that the elements have not been made out of trespass here, out of the judgment, we don't think that this fact could be used, it starts off, it says, "That every entry upon the lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor; and be punished by a fine not to exceed \$100.00 or by imprisonment at hard labor on the public roads of the county for not exceeding thirty days." Then it goes on to say that when any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county in which such lands are situate, and proof of the publishing, and/or such notice, within 12 months prior to the entry, shall be deemed and taken as notice conclusive against the person making [fol. 45] entry as aforesaid for the purpose of hunting or fishing on such land.

Now, these are the words of 16-386, which is substantially the wording of the current Code for the City of Rock Hill. Moreover, may it please the Court, one of the annotations under this case in this particular section, giving the purpose of the section, this section was meant to furnish the owner or tenant in possession of land a legal means to prevent any intrusion thereon by another after notice prohibiting any entry on the same.

Now, if this is in fact the purpose of this section as stated in *State v. Greene*, 1892 case, which perhaps came about before we had variety stores, I can't remember whether McCrory's or Kress' go back that far or not; it says to prevent any intrusion is the intent. The intent here was they would either have to post these notices or advertise in order to meet, to properly cite someone for trespass after notice.

Now, I will readily concede that if this were a fishing or hunting preserve, or something like that, which I think both of them are very fine sports, and a man posted four notices out there, or gave the newspaper notices, all that

sort of thing, if anyone went out there, they could be perfectly right; but the City of Rock Hill, as I understand, their position is, they say that this section, which was determined way back in 1892, is so good that it now can be applied to the modern-day, twentieth century variety stores, wherein a business invitee can go in, in fifty or a hundred or more departments in the store, and spend all of his money, and be treated right by all of the clerks, but yet, if he goes to a particular counter in there, that alone, would give a business man, or would subtract from [fol. 46] that business invitee, all of the right, title and interest he had as a citizen as due process or in protection of the law.

Now, we think that that is not correct; and that primarily is why we want an election here to find out whether or not he is charged under this particular statute, and the Court will note that under this statute, and let us consider for a moment this particular statute, under this particular supplement.

Now, under 16-386 the language is slightly changed. I won't read it all over again, but the language of it is a little bit different, and I think it is important that the record should show that an entry upon the lands of another where a horse, mule, cow, hog or any other livestock is pastured, or any lands, any other lands, any lands of another, rather, after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and the fine shall not exceed \$100.00, and so forth, and it goes on further to say that when an owner or tenant of any land shall post in four conspicuous places on the borders of such land, prohibiting entry and so forth, that proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing.

Now, this particular change that put the animals in, and they substitute, one of the changes is, they say in an annotation that the effect of the amendment, this amendment eliminating the necessity for notice to be published in a newspaper, not the posting of the notices, only in the newspaper, and the failure of the proof relating to the time of the posting, and substituted trespassing at the end

of the section for hunting or fishing on lands of another, and I would say in retrospect that whoever designed this statute, I notice they changed the word trespass at the end, [fol. 47] but yet when they sought to amend it at the beginning, they went further to indicate what we think is why they put in here "where any horse, mule, cow or hog or any other livestock is pastured," perhaps they were taking into consideration between 1892 and now that perhaps on what would be known to be a hundred per cent hunting or fishing preserve is a question of livestock and so forth, it was getting to be a problem, and as the Court knows, this is in a section of law dealing with that kind of thing, which is a section, and now we think that without prolonging further argument on that particular point, we do not think that that statute is applicable here.

Now, may it please the Court, that with reference to the law of May 16th, 1960, which was approved by Governor Hollings, and which I think under the rules would now be the law of the state, of course this has been passed and approved just prior, or shortly prior to this particular offense; now, as the Court is aware, I am sure that except for this one that I hold in my hand, this statute which has been interpreted back before 1892, that this State did not have for one reason or another something covering notice on the Trespass Statute as much as our sister state of North Carolina, and in that connection we would like to cite for the purposes of the record, to sustain the point of what would be proper in that case, the case of *State of North Carolina v. Paul Tinder*, which is annotated in 49 A. L. R. 597, and is noted in 135 S. E. 451 and is also in 1926 case 29 N. C. 559, which is a case of forcible trespass and forcible intent, where the intent there and so forth is to make a clear distinction between the civil and criminal law.

Now, in this particular case, the Chief Justice sustains the proposition much as we have read to be the law, where [fol. 48] there is a trespass by statute, which is Section 85 of Am. Juris., Volume 52, where without going into what actually happened here, Your Honor, somebody got mad because the store proprietor had turned them into the law

for having a whiskey still, and they went in there to get even, and in the process of discussion they had some violent language, chasing each other around, and so forth, in other words, they had plenty of action, disorderly conduct and that sort of thing, and the Court of course declared and held that those elements would be proper in this case.

We don't think that this has been overruled. We think that the annotation is important because it is very short, and it lists a number of cases giving the law of North Carolina, I am cognizant that this is South Carolina, but this point is not too clear in South Carolina out of judgment, and there is an 1886 case of the *State v. Wilson* where there were insults and demonstrations of violence, and a case in 1887, *State v. Tolbert*, where there was violent language, and in the *State v. Gray*, which was 1891 case, they carried off personal property of another, and it amounted to a breach of the peace.

A lot of these cases stated here in the statutory provisions, if they would be traced out, I am not going to put in the record all that, deal with tenants and so forth, and notices and so forth, but in every case, as far as we have been able to find out, except possibly this case of *Schramek v. Walker*, which we are frank to say is not applicable to the law in this case, we think this is a strict case of where a business invitee went in, as a matter of fact this is a very interesting case, Your Honor, trespass, for this reason, as a business invitee of this particular store, not only did this man invite him to buy, but he under the law of the duties [fol. 49] owed by proprietor to business invitee, could have come in there and looked around alone; as we know, that is, properly go window-shopping, to go in a store and look around, and so forth; now, this defendant, had he walked through all these departments, and just passed by this counter, this particular counter, maybe he would not have been arrested; but it is admitted here that this man is neatly dressed, and incidentally he was in a wheel chair, he was not sitting at the counter, by the way, and as I understand it, there is not too much testimony about this back counter, but I thought I heard the State say something about the fact that there was a bar back there where

you could stand; I don't know what they are basing this thing on.

We think that under the statute here, which he is trying to get this man for trespass, that technically—but in the criminal sense this is not a trespass, we don't think. Now, if this were a case of an antique shop, fur salon, where a man has advertised, "No Indians come in here," let's take out the question of being a Negro or a white man and so forth; and a person came up whom he recognized as being an Indian, and he said, "I am sorry, Madame so-and-so, you cannot come in here," why, that is perhaps a different problem, maybe the law in that case should not be so, but where a man is operating a store of this kind, with open counters, and open displays, and has just demonstrated five minutes before he will take all the money this man has, figuratively, legally, you know what I mean, just because he turns this way, may cause him to be arrested; but I am not too sure from what the City has put up here that, according to my notes here, whether the man wanted him to leave the store, or leave the counter.

[fol. 50] There is a counter where he could have bought merchandise if he had turned his chair around two feet; he could have spent fifty dollars there, and talked to the clerk any number of times; but if he turns back this way, and says, "May I have a cup of coffee," that alone is just a mere request, without any notice, and Captain Hunsucker says that he was not doing it under the law, if I remember his testimony correctly, assuming what he said is correct, he said that this man, that he wanted to arrest him by law, not by custom, of course we know that is not due process, and so forth.

Now, coming for a moment to this law here, which goes into more detail, the Court has a copy of this, is that right? We don't think this particular statute is constitutional for a number of reasons, but we are aware—I would like to address myself on the question right now as to whether or not he made himself out a *prima facie* case, or the elements of a *corpus delicti*, sufficiently to charge him under this Act. This is a new Act, and the Act, of course, is to provide for the offense of trespass after warning, and to provide further for enforcement, and jurisdiction thereof.

We say first that the trespass after the warning in relation to this other statute; we don't, apparently, from this statute here, somebody allegedly tried to shut the door before you came in, and shut the door after you got in, after he got you in there, during any act that the proprietor, the corporate proprietor or servant and so forth, did not like, he could call the police and get you arrested. Now, as to the first part, that any person who without legal cause or good excuse enters into a dwelling house or place of business on the premises of another person, firm or corporation after having been warned, within six months preceding, not to do so, we feel that that part could not be [fol. 51] applicable here, because obviously there is no warning. As a matter of fact, there is a current invitation as of right now by the prosecuting witness, apparently, for the State, for all of us to go in there and spend our money this very minute, so there would not be any question about that.

Of course, they are going to say here that any person who, having entered into the dwelling house or place of business, which is what the defendant did here, on the premises of another, without having been warned by him within six months not to do so, on the contrary, "Come on in, spend your money, and I will put you out when I want to," and fails and refuses, may it please the Court, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, his heir, or its agent or representative, shall on conviction be fined not more than \$100.00. Now, of course the Court is very learned, I am happy to say that we think it is, and that this is a legislative act, and this act would have to be reasonable, and it would have to have a good *corpus*, it would have to have a proper yardstick, it cannot be arbitrary or unreasonable.

One of the things that bothered us, quite frankly, in the citing of the particular classifications which we shall mention in a motion, is simply this, that we have been unable, and we hope we have not been totally stupid in not being able to find it, this question of "without good cause or good excuse." Quite frankly, we don't know what that means. Whether it is arbitrary; I appreciate it not as a yardstick,

cannot cite one citizen, the good cause apparently in the defendant's case, it is apparently because, may or may not be because he is a Negro. Certainly it would not be constitutional to give a private citizen, aside from the fact of [fol. 52] whether or not he can conduct his business like he wants to, an additional weapon, to say "without good cause or good excuse"; now, who is going to judge this good cause or good excuse? The proprietor of a business, that is more power than a policeman has got, your officer at least has got to show probable cause, at least he has got a uniform on, and that kind of thing, and that kind of thing would go to his judgment of the case. We don't think that these particular criteria here is enough to require due process or equal protection of the law. Now, as I understand the testimony here, which Captain Hunsucker gave, he said that he was not asked by the manager to arrest him, if I remember the testimony correctly. He is a principal witness here. He testified that he was not asked by the manager to arrest him. Now, why did this man get arrested? Where is this good cause going to come from? Does this give the police officer, as we say, we don't have any law, we are not going by custom, did he walk in there and just arbitrarily see an Indian sitting down at that counter, and say, "Uh-oh, he doesn't look like he is the right kind of a nationality, and therefore it is good cause," and arrest him? Even where the manager doesn't ask him to arrest him, and even if the manager did ask him to arrest him, I think that the police officer of the State is still under a duty to be careful in his judgment, and of course he can exercise his judgment as he wants to, as to whether or not he is going to arrest that man when he knows, when he is there, standing there, the man is not using any violent language, and the defendant is a preacher, and that alone, in this particular type situation—now, we would like to say this, that we think that we should now elaborate on another constitutional aspect of it, we think this particular statute right here in my hand not only violates the [fol. 53] Fourteenth Amendment of the U. S. Constitution, which Mr. Perry will talk about, but I would like for the record to show, and address the Court, at this point, that

this in our judgment, this particular thing, violates the Constitution of South Carolina, to wit, Article 1, Section 5, which says that the privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of lawfully held property without due process of law, nor shall any person be denied equal protection of the laws. This is our South Carolina Constitution, talking to the legislative, executive and judicial; and, of course, fortunately we think that it is up to the Judiciary to determine whether or not this Act would be constitutional. We think that this is the law of this State. This matter of due process and equal protection is so thickly intertwined and so forth that it is kind of hard to separate one from the other, but assuming for the purposes of arguing this matter, which we ask you to, we submit has to be interpreted with due process, and under the equal protection clause of Article 1, Section 5, of the South Carolina Constitution, now Am. Juris. has a lot to say about this, about the constitutional law, I am sure the Court is familiar with it, but one of the things that it did say, I think this is in Volume 12, Section 472, page 133, I believe, it is either Volume 10 or 11, it says that the relationship between due process and equal protection of law, talking about the phases, says that if the law under consideration operated equally, talking about this statute which I hold in my hand, talking about the 2nd section now, because we are obviously not within the first section, if the law under consideration operated equally under all who came within the class to be affected, [fol. 54] embracing all persons who were or might be in like situation and circumstance, and the designation of the class was reasonable, not unjust, capricious, or arbitrary, but based upon a real distinction, and the law operated uniformly, all the rest, all the law, I am not talking about just this law here, I am talking about all the law, but here it talks of deprivation of his liberty, which is the most precious thing that America has, and that, if, added to this, the law was enforced by usual and appropriate methods, enforced by usual and appropriate methods, the requirement of due process of law could not be said to be denied, and

we think that this apparently, we think that the, in view of the Article 1, Section 5, that the Legislature is trying to impose by what we call the law of *libel innuendo*, they are almost like electricity, you can feel it, you can't see it, but you can feel it; you see a class of legislation affecting persons and giving power to a class of individuals.

We think that, of course, that this is not proper. We don't think the classification is reasonable, and even if the classification is reasonable, we don't think that this yard-stick, assuming the good cause or good excuse, whether or not the landlord or his agent, or manager, says he is exercising good faith or good cause, a good excuse, what makes good cause or makes a good excuse, is it going to be color? Is it going to be disorderly conduct? Is it going to be language? Is it going to be the way you have your hat on or off? What is it going to be? Certainly the State is not saying openly that this law will only affect Indians and Chinese. We think that if it were good in all other regards, which we don't think it is, that that particular matter in there is wrong, where with this thing it says to leave immediately upon the order to do so, or request to do so, by the [fol. 55] person in possession, his agent or representative, we think quite frankly, Your Honor, that a great deal of strife could arise out of this. This thing is subject to be interpreted; that some clerk at the safety pin counter, apart from the lunch counter, suppose a stranger, or it could be either the defendant, went in there, he went in and asked her for change or something, and she said the defendant was at the lunch counter, and the policemen came in there and arrested him, came in there and asked him to leave, why, without even knowing him. The power is stretched out too much.

We know, of course, what the levels are of ownership, of property, who is going to do it, the manager, his assistant, his cashier, his clerk? Anybody in there? Who is going to have the power of arrest? Well, I would say that that is unreasonable and oppressive in this case. They could do things even Captain Hunsucker cannot do. We say this is not a valid part. We think this is a very important thing.

The Court: A good cause or excuse does not have anything to do with why he is asked to leave, it has got to do with whether he can stay.

Mr. Spencer: To show good cause or excuse for staying.

Mr. Sampson: May it please the Court, we take this position on that, that's why it is going to affect a class of persons, because suppose that interpretation is in effect, they ask him to leave, the asking him to leave business, and this lunch counter business, where there is no law, they can all operate by custom, and just ask him to leave the lunch counter, is he asking him to say that "You can go back around these fifty departments I have in the store, and spend yourself another hundred dollars as a business [fol. 56] invitee, but you can't come back here and ask the clerk to give you change or a cup of coffee." You see, in other words, if it is the law that a businessman can have all these privileges and so forth, it would seem to me highly unreasonable to now amend the statute so he of his own motion can say, "Okay, come right in, I will take all the money you have got if you go in 98 per cent. of the place, 98 per cent. of the store, and so forth, but you can't go to the lunch counter here, now, go to some other eating place."

This is a Law of Sale and of vendor and vendee. I don't think that to permit that kind of situation, he is asking him to come and at the same time he is telling him he cannot use the lunch counter, well, "I am asking you, I am withdrawing your invitation," he is only withdrawing that part of the invitation which is infinitesimally small in relation to the money that was spent there, it is only put there for convenience anyway, some people use it for lunch. I think that is too much power, I think that if you are going to interpret good cause or good excuse, because you can't use a particular department, that is carrying it a little bit too far.

The Court: Will you read the section again, is that exactly what the section says? Read the section again.

Mr. Sampson: Fails and refuses without good cause or excuse to leave.

The Court: Right.

Mr. Sampson: The question becomes this, really, can a business simply refuse to allow a business invitee to use a normal area of a store of this type, dedicated to the public, where he has all of these other privileges, and so forth?

The Court: It doesn't say that the owner of the store has to have any cause or excuse, it says that he has got [fol. 57] to have a good cause or excuse to stay, or else he would be guilty under that section of the law.

Mr. Sampson: Well, what he is saying is, the reasons he says, "I am staying here, I am responding to your invitation to spend my money, I have just spent my money over here, and this is a service over here, and no notice of anything else—"

The Court: Wouldn't that be a question of fact for the jury to determine, whether he had good cause or excuse not to leave? I am not trying to cut you off, but the section doesn't state that the store owners have to have good cause or excuse to ask him to leave, it says if they ask him to leave, that he has got to leave unless he has got good cause or excuse to stay as I read it, I just glanced at it.

Mr. Sampson: That is true, under the capitalistic system of taking his money, it sounds like to me, "Put your hand in his pocket this way, but if you put it in this way, you can't do it." I would like for the Court, I am sorry I took so much time—

The Court: That is all right, do you have anything else you wish to say at this time?

Mr. Sampson: I would like for you to listen to Mr. Perry on the second part of the motion in regard to the Constitution.

Mr. Perry: I beg your pardon. Perhaps Mr. Spencer wanted to reply to this argument.

The Court: Well, unless he wants to do it—

Mr. Spencer: I will not break in on the presentation.

The Court: All right, go ahead.

Mr. Perry: All right. May it please the Court, I would simply like to state first of all that on behalf of my associate we would like to renew his, or to make a motion for judgment of acquittal on the same ground that he just [fol. 58] made a motion for a directed verdict.

I believe at the conclusion of this stage of evidence we would want to make motions for a judgment of acquittal.

Now, at this time, we make motion for judgment of acquittal on the ground that the evidence shows that the defendant, who is a Negro, was charged here with an offense as the result of his being on the premises of the McCrory's Five and Ten Cent Store, at its lunch counter, which store follows a custom of either excluding or segregating Negroes at its lunch counter. The effect of our motion is that the charge of trespass, which was preferred against him by reason of the fact that he was upon the premises at the lunch counter, and being a member of a race which is either excluded or required to be segregated at the lunch counter services of the McCrory Five and Ten Cent Store, we take the position then that the application of the trespass statute of South Carolina to the defendant in this case is in violation of his rights under the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Your Honor, without being very long, I would simply like to state that we rely here upon the United States Supreme Court case of *Shelley v. Cramer*, decided in 1948. I am sorry, I do not have the citation present in Court with me, but I believe Your Honor is well familiar with that case. There certain private individuals, white persons, in the state of Missouri, followed a private plan of excluding Negroes out of certain housing developments by placing in their deeds certain restrictive, racially restrictive, covenants.

These were agreements between two or more property owners to not sell or lease to any person or persons of [fol. 59] African descent. The Supreme Court of the United States, first of all, I will show you the violation. Some white person apparently sold a piece of property to a Negro. The Negro was subjected to court action by some white neighbors of his, and resulted in the carrying of the case to the United States Supreme Court. Chief Justice Vinson said in that case, Your Honor will recall, that the Fourteenth Amendment does not condemn purely pri-

vate action, no matter how discriminatory in nature, but that the State could not aid the carrying out of this private discriminatory policy, either through its legislative, its judicial, nor its executive branches. There was, the minute one of the branches of the State Government, whether it be legislative, judicial or executive, entered into it, the commands of the Fourteenth Amendment entered the case. We therefore take the position that when Captain Hunsucker went into the McCrory store, and exercised the police power of the City of Rock Hill, the part of the executive branch of the City of Rock Hill in the enforcement of the McCrory Five and Ten Cent Store's racial discriminatory policies, that the State of South Carolina entered into McCrory's operations, and that it gave legal effect to an otherwise completely private policy of racial segregation.

Under the doctrine of *Shelley v. Cramer*, then, we take the position that the defendant here is entitled to an acquittal by reason of the fact that the State has exercised its power to enforce a private policy of racial segregation.

Mr. Spencer: May it please the Court, for the information of counsel for the defendant, the case he just cited will be found at 334 U. S. 168, Supreme Court 386, 92 Law Edition 1161, I refer to *Shelley against Cramer*.

[fol. 60] Mr. Perry: Thank you, sir.

Mr. Spenceer: I am relying on it, too. Counsel for the City would not deny that under the common law there is a basis for the claim that criminal trespass is not made out without some accompanying act of disorder or violence or in creating of an aspect of terror of some sort, or fear. We submit that this is not true of a criminal trespass under statute, and that the criminal trespass statutes were enacted by many states for the purpose of bridging that gap, and closing what might otherwise have been a gap under the old common law. Therefore the position taken by counsel for the defendant would give them no benefit in this cause, which is tied entirely to the statutory remedies.

Now, reference has been made to the publication and posting of notices. I submit that a careful examination of both the State section referred to, that is 16-386, and the City ordinance of the Code of the City of Rock Hill, Chap-

ter 19, Section 12, will reflect that the language of both spell out clearly that the entry on the lands of another after notice prohibiting the same makes out a case of trespass, and that the matter of how the notice was given, whether by publication or by posting, is an aid to proof, and not a required form of notice.

Unquestionably those provisions of the 1954 amendment to Section 386, correction, Section 16-386, of the Code, which deals with the matter of lands used for the pasturing of horses, mules, cows, hogs, or other livestock, have no proper application in this case, and certainly counsel for the City have not asserted at any time, I have not thought it necessary, that the defense counsel argue that point, but apparently they did, and I want to make the record clear that they have not asserted that they are applicable in this case.

[fol. 61] The Section in question read, without reference to those words, said, "Every entry on the lands of another," then it has those words about the pasturing of any livestock, "Or any other lands of another after notice," so that without reference to those words which were added in '54, the State Section is complete, and refers to all types of trespass after notice.

The City Code says, and I quote: "Every entry upon lands of another after notice from the owner or tenant prohibiting the same shall be a misdemeanor," and then it goes ahead and explains the means by which you may give notice and establish *prima facie* proof. That notice has been given, or conclusive proof as it says in the ordinance.

Now, Your Honor, we submit that under the South Carolina case of Schramek against Walker, 152 South Carolina, §9, 149 South Carolina, that is, 149 Southeastern 331, the withdrawal of an invitation, whether expressed or implied, upon the premises of another, and that the direction to leave, followed by failure so to do, responsive to the demand, converts the initial entry into a trespass *ab initio*, and that the act of demanding departure under the Rule laid down in Schramek against Walker becomes tantamount and equivalent to notice not to have entered in the first place, once those facts are proven and those circumstances are made out.

Now, Your Honor, under the case of *Williams v. Howard Johnson's Restaurant*, 269 Federal (2d) 845, the Court holds that the customs of the people are not State action within the prohibition of the Fourteenth Amendment, and it goes on to point out that a restaurant is not engaged in interstate commerce merely because in the course of its business it happens to serve people, maybe traveling from [fol. 62] one state to another, and in the case of *Alpaugh against Wilberton*, 184 Virginia 943, 36 S. E. (2d) 906, the Court holds that a proprietor of a restaurant is under no common law duty to serve everyone who applies to him. It goes on to point out that in the absence of statute, he may accept some customers and reject some others on a purely personal ground.

We submit that those rules are generally recognized as law, and would have proper bearing in this state, even though from Courts beyond the jurisdiction of this state.

The defense counsel in presenting the motion just heard complained that on the matter of good cause or good excuse, this statute, invests some arbitrary, unreasonable power of decision within the police officer. The City asks him to point out that under the statute the power of the decision as to whether or not the person charged is guilty or not guilty is left in the Court, and not in the arresting officer. He can do no more than make the arrest and bring the defendant before the Court for trial. I think that there is no question but that actually the question is one for determination by a jury, in a case tried by jury, and otherwise by the Court if the Court be the trier of the facts; but in the final analysis it is a question of fact for determination by the Court, and not a matter for decision by the arresting officer.

I would point out further that under the evidence in this case this arrest was not made until in the presence of a law enforcement officer the defendant had been requested and ordered to leave the premises of another on whose premises he was then, or had been entered, and on his refusal to do so, responsive to such order, there is no showing that the City arrested or sought to arrest anyone [fol. 63] who was not first ordered and refused to leave, nor is there any showing that the matter of race was in

any way involved in the action of the city. The only testimony in the record is that this defendant was ordered to leave. He didn't leave, and he was arrested. Now, we have gotten into a lot of assumptions about what he might have bought before all of this occurred, but I submit that, if Your Honor will recall, that there is no testimony in the record other than that he sought a refund for certain articles, but that there is nothing in the record to show when he bought them, whether he had had them a year or ten years, or a day, or an hour.

Now, if the defendant's counsel wants that information in the record for consideration by the Court, I will submit that they will have to go ahead and put it in by their own witnesses, because the City's officers were not there when any purchases were made, and did not know when the purchases were made, and actually I don't even know whether the store manager would know exactly when the purchases were made, certainly not of his own knowledge, probably.

It is therefore the position of the City that there is nothing in this record to indicate that the action of the City was in any way whatsoever based on the question of racial discrimination, and that had the order to leave not been given, this defendant would have been permitted to sit right there just as long as he wanted to, and as long as the management did not order him to leave; but when he was once given the order to leave, that then constituted a violation of the law when committed in the presence of the police officers, which placed upon the officer a duty to act to prevent further or continued violation of law, and that, in that connection, I point out particularly, Your Honor, that the 1960 Act, approved May 12, 1960, as [fol. 64] Ratification No. 896, imposes the specific duty that "all police officers of this State and its subdivisions are hereby authorized and directed to enforce the provisions hereof within their respective jurisdiction," and that was just what was being done, Your Honor.

Finally, we submit, Your Honor, that there was an entry responsive to an invitation either expressed or implied; next, that there was a withdrawal of such an invitation.

and a demand for the defendant to leave; next, there was a refusal to leave responsive to such demand; and finally, that there is a lack of any good legal cause or good legal excuse, and we submit it must come up to the level of legal cause or legal excuse, and not be any question, for refusal of the defendant to leave, and that that makes out a completed offense, and on that basis the motion should be denied.

The Court: I think that is a question of fact for the jury to determine.

Mr. Perry: Then there is no further reply.

The Court: All right. Off the record.

(Recess taken.)

The Court: On the record. Let's come to order.

Mr. Sampson: May it please the Court, we would like to move the Court to call the manager of McCrory's as a hostile witness.

The Court: Wait a minute, I had better wait until Mr. Spencer comes back.

Mr. Spencer: If it please the Court, I am entitled to inquire as to the full consideration of this request is to the issue now pending before this Court.

Your Honor has already stated to defense counsel during the course of defense counsel's argument on the motion that any question having to do with cause or excuse for not leaving upon demand of management is a matter to be proven by defense witnesses, or by the defendant. [fol. 65] Certainly I do not see how they can seek to elicit from this witness testimony as to whether or not the defendant had just cause or excuse for any failure to leave upon demand, and furthermore, I do not believe that they have in mind to try to disprove the fact that the man demand to leave was made, and I therefore do not follow just what basis or necessity there is for them to call this witness and particularly to call him as a hostile witness. I will object to it for the reasons stated, and I ask that the right be denied unless defense counsel can show some proper legal basis upon which such request is made.

The Court: I cannot remember what this section does say about calling a hostile witness. I know you have got to declare him hostile, but I have forgotten how you do it.

Mr. Dunlap: You have got to lay the foundation there, Your Honor.

The Court: Got to lay the foundation, I know that, look in your Circuit Court Rules. Can you tell me off-hand, I don't remember, I just went into it recently, when can you call a hostile witness?

Mr. Sampson: We think that the rule, and of course, as Mr. Dunlap said, you have got to lay a foundation, we believe ordinarily that a party may call a witness and because of something he testifies to or says, that he did not have any knowledge of, or so forth, that—

The Court: You can do that any time.

Mr. Sampson: But, anyhow, we take this particular position on this particular case, that the defendant is entitled to present his defense, and he can call whomever he pleases, whether or not the witness is hostile or not, in this particular case we think that it is germane to this particular charge, since he has charged him under this Act here, that we show the circumstances and so forth [fol. 66] for his being a business invitee, and how he got in there, and so forth; now, of course, if the City wants to take the position, which I don't think he does, that this was State action, and purely on Captain Hunsucker's part, that it was his own judgment and everything else, that he went in there and yanked the man out, then we might take the position—

Mr. Perry: By reason of the very nature of the case, all the testimony has surrounded Mr. Whiteaker, he is presumed to be hostile.

The Court: I think that is right; but I can't remember what the law says.

Mr. Spencer: If it please the Court, I do not think that they can pick somebody out and say, "This man is hostile, I want to call him as a hostile witness."

Mr. Sampson: We are not picking anybody out. This man is germane to the arrest of this defendant.

Mr. Spencer: I think that has got to be demonstrated by his attitude and demeanor on the witness stand, if he

becomes hostile then they can by proper showing, show that he is a hostile witness.

The Court: There is a code section that you can call a person as a hostile witness for the purpose of cross examination. You have got to have some right to do it, and I want to know what the right is. I know I tried to do it here a while back, and the Judge said I didn't have the right to do it. Of course, I thought I had the right to do it, but he said I didn't.

Mr. Dunlap: I have not found it, Your Honor, but if you will permit me, I think the whole purpose of calling a person a hostile witness is to permit them to ask questions that they ordinarily would be only permitted to ask on cross examination.

Mr. Sampson: That is right.

The Court: And not be bound by the testimony? [fol. 67] Mr. Dunlap: That is right. Therefore, I think that they have a perfect right to call the witness, but not call him a hostile witness in advance of testimony, and if in the course of the testimony it develops that he is hostile, then I think that they have a perfect right to ask Your Honor to move to permit them the right of cross examination.

The Court: Well—

Mr. Sampson: We thought that under the facts of this case, the facts that have been mentioned so many times, by the testimony of the State's officers, they have already mentioned him and the circumstances and so forth, and laid a proper foundation, therefore, we can start out in very good faith that he is very hostile to us, and therefore that would allow us to ask him more or less what we wanted to ask him, as if he were under cross examination.

The Court: I recall that the section did say that you declare to the Court that the witness is hostile by nature, that you have a right to call him as a hostile witness and ask him cross-examination questions on direct examination. I think that is the law.

Mr. Dunlap: But they are already anticipating his answers. He might be, we don't know what his answers are going to be.

The Court: I understand that the law gives them the right to call the witness. They say he is hostile by nature. The fact is that there is a test of it, I can't remember what it is.

Mr. Sampson: We think that under the facts of this case so far developed, that he would be hostile by nature because we have reason to believe it was because of the difference in race, and I am not taking the position that I believe that that alone would make him hostile, quite frankly I don't [fol. 68] say so, but in this particular case, so far as the arrest is concerned, I would not have it in the record anywhere that I would say that a man was hostile purely because he happened to be of another race, we don't believe that, that is not our position.

The Court: I understand that.

Mr. Sampson: Yes.

The Court: Did you find it, Mr. Spencer?

Mr. Perry: Pardon me, sir—

Mr. Spencer: We are trying to find it, your Honor, if you will indulge us just a moment.

Your Honor, this is all we can find on it.

The Court: This is not the section that I referred to at all. Suppose we go on and call the witness.

Mr. Spencer: I would like for Your Honor to spell out what the procedure would be, if Your Honor is going to rule on the matter, if you would care to do so.

The Court: Well, I am going to permit them to examine him in the nature of cross examination at least. That would not preclude you from cross examining the witness.

Mr. Spencer: I understand that he would not be my witness, and I assume that I could examine him on cross examination.

The Court: That is right. Possibly they may be able to lead him for the purpose of cross examination.

Mr. Spencer: Well, Your Honor, does that mean that they are entitled to examine him as to matters which are necessary to the issues now before this Court, that is the question I want to know, what our status is on that.

The Court: I am not going to let them go on fishing expeditions, if that is what you are talking about, Mr. Spencer.

[fol. 69] Mr. Spence: That is exactly what I am talking about, Your Honor.

The Court: Let's stick to the issues.

Mr. Sampson: We call Mr. Whiteaker.

The Court: All right, come up and be sworn.

(Witness sworn.)

Mr. H. C. WHITEAKER, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sampson:

Q. Your name is H. C. Whiteaker, sir?

A. Yes, sir.

Q. Where do you live, Mr. Whiteaker?

A. 552 Aseot Ridge.

Q. That is in the city of Rock Hill?

A. That is correct.

Q. How long have you been a citizen and resident of the city of Rock Hill?

A. About 21 years.

Q. About 21 years? And where are you currently employed, sir?

A. McCrory's, J. D. McCrory's Five and Ten Cent Store.

Q. Is that a part of an established chain?

A. Yes, it is.

Q. Variety chain?

A. Yes, it is.

Q. What is your position there, sir?

A. Manager.

Q. Is there anyone over you in power in Rock Hill?

A. No, sir.

[fol. 70] Q. Is it true, then, that what you would say as to the policy of that store would control the store so far as the citizens of Rock Hill are concerned, is that right, just generally?

A. Generally.

Q. All right. Now, how many departments do you have in your store?

A. Around twenty.

Q. Around twenty departments?

A. Yes, sir.

Q. All right, sir, is one of these departments considered a lunch counter or establishment where food is served?

A. Yes, sir. That is a separate department.

Q. Oh, that is a separate department? I see. And how much space divides this particular department from another department?

A. Just an aisle.

Q. Just an aisle?

A. Yes.

Q. I see. How many departments or counters not concerned with the lunch counter, are immediately lined up beside the lunch counter. I assume that this is a lunch counter on the side of your store, how many counters or aisles would be along that side?

A. There are two.

Q. Two all the way up and down?

A. Yes, that's right, beside of it.

Q. Two of them?

A. Yes, there are two of them.

Q. Now, of course, when you say twenty departments, you are including all of the counters from which merchandise is sold, is that right?

A. Yes, sir.

[fol. 71] Q. How many counters do you have in your store?

A. Well, I would have to count them.

Q. Well, are there 50 or 75?

A. Counters?

Q. Yes, sir, upon which merchandise is displayed?

A. I would say twenty-to twenty-five.

Q. 20 to 25?

A. Yes, sir.

Q. Now, how many different items of merchandise do you sell in your store?

A. I have no idea.

Q. Would you estimate it to be 2,000 or 3,000 or 1,000?

A. It would be more than 3,000.

Q. More than 3,000? Is that right?

A. Yes.

Q. I see. 3,000 items, and most of these 3,000 items can be bought from an open display counter arrangement, is that right?

A. Yes, sir.

Q. You have no partitions in your store in the walls? Is that right?

A. That's right.

Q. Now, I believe, is it true that you invite members of the public to come into your store?

A. Yes, it is for the public.

Q. And is it true, too, that the public to you means everybody, various races, religions, nationalities?

A. Yes, sir.

Q. The policy of your store as manager is not to exclude anybody from coming in and buying these three thousand items on account of race, nationality or religion, is that right?

[fol. 72] A. The only place where there has been exception, where there is an exception, is at our lunch counter.

Q. Oh, I see. Is that a written policy you get from headquarters in New York?

A. No, sir.

Q. It is not. You don't have any memorandum in your store that says that is a policy?

A. No, sir.

Q. Do you have any memorandum from the police department of the City of Rock Hill?

A. No, sir.

Q. I see. Now, sir, if I may ask you, what is the basis of this policy as to the lunch counter; first, I want to know as to race, religion and nationality.

What is the basis of it?

A. Since I have been here, which is, the restaurant has been open nine years, we have not served a Negro seated at the lunch counter.

Q. You have not served a Negro seated at the lunch counter? All right. Of course, you don't have any questions about religion of anybody sitting down there, do you?

A. No, sir.

Q. No question about the nationality? Of the people sitting down there?

A. No.

Q. And is this an American Negro you are talking about, or anybody of a dark hue, how do you tell? What is your criteria for determining that somebody is a Negro that sits down at the lunch counter?

A. I would say by color.

Q. By color? All right, suppose Mr. Smith went in there, would you say that he is a Negro?

A. Yes, sir.

[fol. 73] Q. Of course, you arrested the defendant, is that right?

A. I did not arrest the defendant.

Q. Excuse me, I withdraw that question. All right. So there is no discrimination on race, nationality or color; is there any discrimination on political belief? In your store?

A. Not that I ever had any occasion to know of, none.

Q. Is it true, then, that if, that well, even if a man was quiet enough, and a Communist, that he could sit at your lunch counter and eat, according to the policy of your store right now? Whether you knew he was a Communist or not, so his political beliefs would not have anything to do with it, is that right?

A. No.

Q. Now, sir, you said that there was a policy there as to Negroes sitting. Am I to understand that you do serve Negroes or Americans who are Negroes, standing up?

A. To take out, at the end of the counter, we serve take-outs, yes, sir.

Q. In other words, you have a lunch counter at the end of your store?

A. No, I said at the end, they can wait and get a package or a meal or order a coke or hamburger and take it out.

Q. Oh, to take out. They don't normally eat it on the premises?

A. They might, but usually it is to take out.

Q. Did you see any of them eat food on the premises bought from that counter in the nine years you have been there?

[fol. 74] A. I can't recall that I have. I can't recall that I have.

Q. Of course, you probably have some Negro employees in your store, in some capacity, don't you?

A. Yes, sir.

Q. They eat on the premises, is that right?

A. Yes, sir.

Q. But not at the lunch counter?

A. No, sir.

Q. Incidentally, do you have a Negro American employed at the lunch counter? As a waitress or something of that sort? Cook?

A. I have a cook.

Q. A cook, all right, sir, and you allow her to cook the meals, is that right?

A. Just cook the meals at the lunch counter.

Q. Within the premises, very much as you would hire a servant, Japanese or Chinese or Negro?

A. Yes.

Q. All right, now, do you ordinarily, your policy is to treat Negroes, say a man like Mr. Ivory here, it is okay to buy at the 24, no, 25 departments, selling 3,000 items, are you counting the lunch counter items in that particular 3,000? You are not counting them, are you?

A. Well, you asked me how many items we sold, and I said we sold around over 3,000 items.

Q. Oh, I see, but generally speaking, you consider the American Negro as part of the general public, is that right, just generally speaking?

A. Yes, sir.

Q. You don't have any objections for him spending any amount of money he wants to on these 3,000 items, do you?

[fol. 75] A. That's up to him to spend if he wants to spend.

Q. This is a custom, as I understand it, this is a custom instead of a law that causes you not to want him to ask for service at the lunch counter?

A. There is no law to my knowledge, it is merely a custom in this community.

Q. Oh, I see. By the way, is it a custom, do you ever cause a policeman to come into your store and arrest somebody in furtherance of that custom, is that a custom, too?

A. I don't understand your question.

Q. Well, let me ask you this. Well, on this particular day of June 7, 1960, there were several Negroes in your store, as would normally be at twelve o'clock, is that right?

A. I imagine so, yes, sir.

Q. Do you know of your own knowledge whether or not; first, now, I believe that on this particular occasion you had occasion to talk to one Reverend Ivory?

A. Yes.

Q. Do you know of your own knowledge whether or not he had immediately or just prior thereto made certain purchases in your store of some of these other 3,000 items?

A. Yes, sir.

Q. So there is no doubt in your mind that he was a business invitee, properly within your store at this time and occasion, is that right?

A. He was buying in the store at that time, he had bought at least three items.

Q. At least three items, I see. Now, I would like to ask you, Mr. Whiteaker, I think, that your testimony indicates that Reverend Ivory was arrested on this particular day [fol. 76] and time about when you talked to him, is that right?

A. What particular day?

Q. On June 7th, about 11:30, 1960.

A. Yes.

Q. Let me ask you this. Who called the police, if anybody, to your knowledge?

A. To my knowledge, I noticed Reverend Ivory and Arthur Hamm in the store, and as I said they made a couple of purchases, and on several previous occasions Arthur Hamm has sat down at the lunch counter, and when I saw him, at the lunch counter, I—

Mr. Sampson: May it please the Court, I realize how we called him; but in case of any prejudice and misunderstanding in this case, we want to move to strike the testimony as far as Arthur Hamm is concerned, as far as other occasions.

Mr. Spencer: If it please the Court, the witness is testifying as to their question, and I don't think they can ask him a question and want to strike the answer.

The Court: Go ahead and let's see.

Mr. Sampson: We will withdraw it. Go ahead and tell me who called the policeman on this day.

A. They had sat down at the lunch counter, and were sitting at the lunch counter, and we have come very near having disturbances on these occasions, so I asked for a police officer to come into the store whenever that takes place, and when I saw them place themselves at the lunch counter, I sent for a police officer.

By Mr. Sampson:

Q. Oh, I see. As I understand, you asked the City to send you policemen, any time you see Negroes in your store?

[fol. 77] A. I did not say that. I said that when they sat at my lunch counter.

Q. Yes, sir, oh, I see. Well, now, did you observe whether, did you observe Reverend Ivory at the lunch counter?

A. Yes, sir.

Q. Did you see him go to the lunch counter, or get in the vicinity between two stools?

A. Yes, sir.

Q. Now, tell me exactly what did you do as manager when you saw him in this area?

A. I went to the lunch counter, and went behind the lunch counter to where they had seated themselves.

Q. Yes, sir, and what else, did you start talking to him?

A. I came up to where they were, and Reverend Ivory asked me for two cups of coffee, and I told him that I was sorry, but we could not serve them. He said, "Why can't you serve us?" "Is it because we are unclean or dirty," I believe, and I told him that I was sorry, that we couldn't serve him.

Q. Did you request him to leave?

A. No, sir, not at that time.

Q. You did not request him to leave at that time?

A. I did not.

Q. Did you request him to leave at any other time?

A. I requested him to leave after Captain Hunsucker and Detective Barnette were at the lunch counter.

Q. You requested him to leave at that time?

A. Yes, sir.

Q. Did they request you to request them to leave in their presence?

[fol. 78] A. They did not. I asked them in their presence. We could not serve them.

Q. Let me ask you this quite to the point. You didn't ask them to leave because of any offensive conduct on their part?

A. None other than if you would call it offensive when he seated himself at the lunch counter, knowing that Negroes or colored are not served there. I asked him to leave for that reason.

Q. So his mere coming in between the stools and asking you for a cup of coffee—

A. He did not come, he was placed in between two.

Q. He is in a wheel chair, much as he is now, come around here, Reverend Ivory, let's see whether this is right. This is the defendant, right?

A. Yes.

Q. He was in this wheel chair he is in now, right?

A. Yes.

Q. So he never did sit at the counter, right?

A. He was as close to the counter as Hamm could place him to the counter.

Q. Did you or did you not, ask him to leave merely because of his race, that is why you asked him to leave, isn't it?

A. I asked him to leave because we do not serve Negroes at the lunch counter.

Q. But that is based on his color and his race, is it based on his religion?

A. I didn't say it was religion.

Q. Is it based on his nationality?

A. I did not say nationality.

Mr. Spencer: May it please the Court, I submit counsel is going beyond the reasonable limits. The witness has

[fol. 79] given him a direct answer to his question, and he is rehashing the same thing over and over again.

The Court: He said he asked him to leave because they didn't serve Negroes at the counter.

Mr. Sampson: May it please the Court, we don't want to stretch it out, but I would like to get the, America has a large number of religions, nationalities, and races—

The Court: I understand that, but he has already answered the question.

By Mr. Sampson:

Q. Otherwise his conduct was all right?

A. Yes.

Q. As a matter of fact, he is perhaps, as you know, perhaps, he speaks very intelligently, doesn't he?

A. I have only talked to him on the one occasion there.

Q. That one occasion?

A. Yes, one occasion.

Q. By the way, Mr. Whiteaker, to your knowledge, do you know whether or not this custom you speak of about not serving Negroes in other stores in this community, do you know anything about that? What is the custom or practice so far as serving Negroes at lunch counters in other stores in this area, do you have any knowledge of that?

Mr. Spencer: If it please the Court, I can't see the relevancy of what goes on in other stores with reference to this case now before this Court. I also think that it is not proper and that it is not relevant to the issues.

Mr. Sampson: Your Honor, as I understand, he is a hostile witness, of course, we don't want to go too far in stretching on cross examination, but we think that his [fol. 80] testimony is, that there is no law, all of the testimony here is that there is no law—

The Court: What was the question you asked him?

Mr. Sampson: I asked him whether or not he is familiar with the customs in any of the other stores in this city, that is all, we have talked about equal protection of the law, and so forth, we think that would be, in this particular business invitee—

The Court: He has already advanced that. Let's try to get on with this.

By Mr. Sampson:

Q. Let me ask you one other thing, sir. You are part of a chain store, is that right?

A. Yes, sir, McCrory's is a chain.

Q. Beg your pardon?

A. McCrory's is a chain store.

Q. How many members are there in the chain, do you know, in the south?

Mr. Spencer: If it please the Court, he has already been into that in the very front end of the argument, let the record be read back to so demonstrate.

The Court: I don't see any need to go any further into that, Mr. Sampson.

Mr. Spencer: May it please the Court, I believe I inadvertently referred to counsel's, the front end of his argument which should have been the front end of his examination, and I would like for the record to be corrected accordingly.

Mr. Sampson: All right, sir.

By Mr. Sampson:

Q. Let me ask you one thing. I think it will be proper. Is McCrory's not one of the largest variety stores in the country?

[fol. 81] A. It is not one of the largest variety stores, but it is rather small compared to some of the other variety stores.

Q. I see. Sixth place, something like that?

A. I would say about sixth place.

Mr. Sampson: That is all, Your Honor.

The Court: Do you have any questions?

Mr. Spencer: Just one moment, Your Honor. May it please the Court, the City has no questions. Come down, Mr. Whiteaker.

(The witness excused.)

The Court: Next witness,

Mr. Perry: The defense calls Reverend C. A. Ivory.

The Court: All right.

(Witness sworn.)

Rev. C. A. Ivory, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Perry:

Q. Reverend Ivory, I have a few questions, please, and will you speak distinctly so that the Court and the Jury can hear you?

Your name is Reverend C. A. Ivory?

A. That is correct.

Q. You are a minister of the Gospel?

A. That's right.

Q. What is your denominational faith?

A. Presbyterian, United Presbyterian of the U. S. A. Church.

Q. Do you have a pastorate in Rock Hill, South Carolina?

[fol. 82] A. I do have.

Q. What is your church?

A. Herman Presbyterian Church.

Q. Herman Presbyterian Church?

A. That's right.

Q. Do you also live in Rock Hill?

A. I do.

Q. How old are you, sir?

A. 39.

Q. How long have you been living in Rock Hill, sir?

A. Approximately 12 years, since '48.

Q. I see. Are you married, and do you have children?

A. I am, and I do.

Q. On June 7, 1960, did you have occasion to go into the McCrory Five and Ten-Cent Store?

A. Yes.

Q. I believe, sir, that you are a cripple.

A. That's right.

Q. Is that correct?

A. Yes.

Q. You are confined permanently to a wheel chair?

A. I am.

Q. Did you go into McCrory's Five and Ten Cent Store by yourself, that is, did you operate your wheel chair into McCrory's yourself, or did you go in in the company of some other person?

A. Someone else assisted me.

Q. I see. Now, why did you enter McCrory's on that occasion?

A. To make some purchases of some articles that I needed in my work.

Q. Did you make the purchases that you went in to make?
[fol. 83] A. I did.

Q. What were those articles, please?

A. I purchased a trash can, and three packs of notebook paper.

Q. Did you pay for them?

A. I did.

Q. Did you understand that you were welcome to do business in the McCrory Five and Ten Cent Store? Before you went in?

A. I did.

Q. Now, sir, I show you some articles and I will ask you whether you can identify them as the articles you purchased on that occasion? First of all, this article which I identify as a trash receptacle; and ask you if you can identify it?

A. Yes, I can. This is the trash can that I purchased at McCrory's on the said date.

Q. Your Honor, we introduce it in evidence, and ask leave to withdraw it at the conclusion of this trial.

The Court: All right, suppose I submit everything, is this all you are going to have?

Mr. Perry: Very well.

Mr. Smith: Will you hand it over and let them see it?

By Mr. Perry:

Q. I show you these items, and ask you whether you can identify them?

A. Yes, these are the packs of paper that I bought on the same date.

Q. And did you pay for them?

A. Yes.

Q. Your Honor, we introduce them into evidence, and ask leave to withdraw them at the conclusion of this proceeding.

[fol. 84] Q. I ask you, sir, what do you do with notebook paper of that size?

A. That is the type of paper that I use in the little book that I jot down notes preparatory to making out my sermons each week.

Q. You prepare your sermons on that paper?

A. That's right.

Q. Reverend Ivory, when you purchased these items, did you receive from the sales clerk a sales slip or any evidence of having paid for your purchases?

A. I did.

Q. I show you these two pieces of paper and ask you whether or not they are the sales slips which you received?

A. They are, sir.

Mr. Perry: May it please the Court, we offer them in evidence, and we do not ask to withdraw those.

The Court: Mr. Spencer, do you want to see these? Is that all? Now, we will accept the trash can and the three packages of notebook paper subject to withdrawal as Defendant's Exhibit No. 1, and a portion of a sales slip, one in the amount of 31¢ and one in the amount of 82¢ total, marked as Defendant's Exhibit 2.

(Thereupon the items as described above were marked Defendant's Exhibits 1 and 2 for identification and received into evidence.)

By Mr. Perry:

Q. Now, Reverend Ivory, after you had made the purchases which you have just now described, what, if any thing, did you then do?

A. After I had made the purchases, as I have described them, the young fellow that was with me in the store, I suggested to him that we go over to the lunch [fol. 85] counter and get a cup of coffee, and a sandwich, since it was drawing near to the lunch hour.

Q. And you said you made that suggestion, and what, if anything, did you do?

A. Well, after he agreed that we would do it, after he said that it would be nice, we went over to the lunch counter, and asked for a cup of coffee.

Q. To whom did you direct the request for service at the lunch counter?

A. To Mr. Whiteaker, I believe, I learned later that he was Mr. Whiteaker.

Q. I see. Was Mr. Whiteaker already behind the lunch counter when you first approached it?

A. I don't recall, I don't believe he was.

Q. How long did you sit there waiting for someone to contact you before Mr. Whiteaker showed up?

A. Well, it was a very brief period.

Q. I see. So that no waitress came over to offer you service?

A. No.

Q. And the first person who came to you was Mr. Whiteaker?

A. Yes.

Q. Will you describe the conversation which ensued between you and Mr. Whiteaker?

A. Well, when Mr. Whiteaker came over, I asked him could we have a cup of coffee, please, and he stated that he couldn't serve us, so I asked him why, and he said he didn't care to go into that, and I asked him then who was he, and he said he was the manager, that he was Mr. Whiteaker, and I introduced myself to him, and he replied, "Well, yes, I know you," something to that effect, so then I asked him, "Mr. Whiteaker, why is it that you can't serve us, is it [fol. 86] because that we are dirty, because we are repugnant, or because we are disorderly, or is it because of the color of our skin?"

And he said he didn't care to discuss it, that he just couldn't serve us.

Q. Now, were either of the police officers there during this conversation?

A. They were not.

Q. When did they arrive?

A. Shortly after, during the time of our conversation, the two officers came over to the area where we were.

Q. I see. And when the officers arrived, did you recognize them?

A. Yes, I did. I recognized Captain Hunsucker. I recognized the face of the other officer, but I did not know his name.

Q. I see. Now, what conversation ensued between you and Mr. Whiteaker after Captain Hunsucker and the other gentleman arrived?

A. As I recall it; when these officers arrived, they said to me, or to us, that they were going to ask the manager to ask us to leave in their presence.

Q. And what, if anything, did you do or say?

A. Well, I believe, now, my memory isn't too clear on this, that the request was made, I know what my reply was to the situation, that I asked them what had I done, and immediately when I asked that, Captain Hunsucker said, "Now, we didn't come in here for any talk. Are you going to leave? If you are not going to leave, we are going to arrest you."

So I said, "I would like to know, Captain, what I have done, so that I will know why I was asked to leave," so he said, "If you are going to talk, we are going to put you under arrest." So then I said to Mr. Whiteaker, "If you [fol. 87] will give us a refund, then we will leave."

He said that they didn't have a refund there at that counter, that I could get the refund at another counter in the store, and I asked him where was the counter, and before he could reply, Captain Hunsucker said again, "You just want to talk, you are under arrest." The other officer immediately grabbed my companion and booted him out of the door.

Q. Now, let me ask you this, sir; during the, first of all, were you dressed neatly?

A. Incidentally, I have on the same clothing that I had on then.

Q. Do you consider that you were clean on this occasion?

A. I would like to think that I was.

Q. Do you consider that you, that you were inoffensive? In terms of body odor or demeanor?

A. I hope so.

Q. Was your conduct orderly?

A. I intended it to be.

Q. And was it?

A. Yes, I would say so.

Q. Were you at any time discourteous in any manner to Mr. Whiteaker or to any clerk or employee in the McCrory Five and Ten Cent Store?

A. No, if I may just go a little beyond, I enjoyed the conversation I had with Mr. Whiteaker, and he gave no indication whatsoever that he was dissatisfied with my presence or the conversation that we carried on.

Q. Did you have any altercation with any customer who was likewise on the premises?

A. No, I did not.

[fol. 88] Q. I would just like to know this one further thing. I believe that you have already covered the fact that you are a minister of the Gospel. What training did you have for your profession?

A. Four years of college, two years in a theological seminary.

Q. I see.

Mr. Perry: I think that's all, Your Honor.

The Court: Any cross examination?

Mr. Perry: You may examine the witness.

The Court: Any cross examination?

Cross examination.

By Mr. Spencer:

Q. Mr. Ivory, you are Chairman of the local chapter of the National Association for the Advancement of Colored People, is that right?

A. That is correct.

Q. Is it not a fact that some time prior to this occurrence that a meeting was held at which you were present, in

which certain arrangements were made with reference to boycotting this particular store in which you said you made these purchases?

Mr. Perry: Now, Your Honor, objection, we object to that question, because it has to do with some prior occurrence or some public meeting which is totally unrelated to the affairs of June 7th. I think the evidence is quite clear as to what happened on June 7th. This being a criminal proceeding, we do not feel that any irrelevant inquiry as to any public meeting prior to June 7th would have any relevance on the issues in this case.

Mr. Spencer: May it please the Court, the witness has testified as to what his reasons were, why he went in this [fol. 89] store on this particular date, and I am exploring under cross examination the veracity of the witness in that regard, and I submit that the question I asked is relevant and pertinent, and will be connected up.

The Court: Well, I think it is pertinent, because of the nature of the defense, as preceded, as to what was the intent. I don't know whether it is otherwise pertinent, but I will accept it for that reason.

By Mr. Spencer:

Q. Will you answer the question?

A. What was the question?

Q. I asked you, were you not present at a meeting at which boycott arrangements or proceedings of some sort were had with reference to this McCrory store?

A. I would like for you to be more specific as to what arrangements took place, please.

Q. I wasn't there, and I am asking you to be specific and tell me what the arrangements were. If I was there I wouldn't need to ask you.

A. Well, the only arrangements that I can remember were some discussions as to not boycotting, but protesting by economic withdrawal at intervals from stores which segregated.

Q. And this store was one of those stores which was to be subjected to such economic pressure, was it not?

A. I believe that you would find that true.

Q. I am asking you, was it true, not do you believe it was true?

A. I state again, I believe that you will find it true.

Q. I repeat the question, and I ask you, was the economic pressure of this group at this meeting to which we referred directed toward this store?

[fol. 90] A. I state again, unless Your Honor would say that I would have to give a definite answer, that I believe that you will find that true.

Q. May it please the Court, I am seeking to find out by interrogating this witness, he submits that he believes that I would find out some other way by asking; I ask that he be required to answer.

Mr. Sampson: Your Honor, this man is a minister, a Presbyterian minister, a very intelligent man, he says I believe you will find it so, I think he is answering it yes, whether it fits Mr. Spencer's definition of how you should go and come in and out of a door, I don't know, but that is intelligent answers that he is giving, so I don't see any use to make an issue out of it.

The Court: Well, it is equivalent to a "yes" answer, isn't it?

Mr. Spencer: All I am asking is, if he says it is a "yes" answer, that is all I want to know, and I am trying to keep him from answering by telling me I can find out some other way. I am trying to find out from him, I believe I am entitled to an answer.

The Court: Do you know of your own knowledge, Reverend Ivory? Please answer the question.

The Witness: May I ask you a question, Your Honor? The mere statement that I believe that you will find it so, that it was printed in the papers, the action that we took there, it was not secretive, I think that you will find some other matters pertaining to it, that is the only reason for giving that type of an answer, and I still say that unless you order me to give a direct yes or no, I still contend that I am within my rights to say that Mr. Spencer would find, I believe, that he would find, that that is true.

[fol. 91] The Court: Do you want a yes or no answer, Mr. Spencer?

Mr. Spencer: No, Your Honor, I don't think it is significant enough, if he wants to hold back that much, I am going to let him get away with it. The jury can determine what effect it is to have on this proceeding.

The Court: All right.

By Mr. Spencer:

Q. All right, Reverend Ivory, what was the period during which the economic boycott was to be enforced on McCrory's?

A. I don't remember any one setting a definite period, Mr. Spencer, I don't recall.

Q. Well, was it in effect on June 7?

A. I state again that I don't recall the period, whether or not it was to be permanent or temporary.

Q. I didn't ask you that. I asked you was it in effect on June 7?

A. I still say that I don't think you will find any definite date.

Mr. Perry: May it please the Court, I respectfully submit that the direct testimony shows that on June 7th that this defendant bought certain items, and he could not have been withholding patronage on June 7th.

Mr. Spencer: Unless he was violating the boycott, Your Honor.

Mr. Perry: In which event, the boycott would have no relevance to this proceeding.

The Court: Well, let's see if we can't make a little more speed. Do you know whether the boycott was in effect on June 7?

The Witness: Do I know whether it was in effect?

The Court: Yes.

[fol. 92] The Witness: No, I do not know whether it was in effect on that date or not.

By Mr. Spencer:

Q. All right, now, you say that on June 7th you went to this store for what purpose?

A. To make some purchases.

Q. And what were the purchases you went there to make?

A. I purchased a trash can and some notebook paper.

Q. And did you not go there to purchase some coffee?

A. I didn't go there specifically with that purpose in mind, no.

Q. Do you deny that you had in mind to seek service by making a purchase at the lunch counter? When you entered the store?

A. I do deny that.

Q. You mean you didn't think that up until after you got in there?

A. That's right.

Q. Now, is it not a fact that protests against segregated lunch counter service in that store by persons in this area had been in progress since February 12, 1960?

A. I believe so.

Q. And you had been familiar with those protests, had you not?

A. To some degree.

Q. But you are saying that on this particular occasion, you did not propose to seek lunch counter service when you went into the store?

A. That was not my original purpose for entering the store.

[fol. 93] Q. I see. Well, if it wasn't your original purpose, was it any kind of purpose that you had in mind to do that at some time before you left the store?

A. Well, evidently, I made the purchase, I attempted to make the purchase before I left the store but it was not a preconceived purpose.

Q. You mean, you are telling the jury that when you went into the store, the only purpose you had was to buy this trash can and these papers, and you did not have any, you did not have in mind to seek lunch counter service before you came out of there?

A. That's right.

Q. You deny that you intended to seek any service from the lunch counter at the time you first entered the premises, is that right?

A. State your question again.

Q. Do you deny that you intended to seek any service at the lunch counter at the time that you first entered the premises?

A. I had no preconceived idea, the lunch counter had not entered my mind when I entered the store.

Q. You never had been, never had received coffee there before, had you?

A. I don't believe so.

Q. You don't believe so, do you not know?

A. No, I never had received coffee there.

Q. All right. Had anything occurred to cause you to think that you would be served on this date?

A. Well, that depends on what you mean. I had never been given a reason, or no one had ever told me directly that I wouldn't be served coffee there, so I had every reason to believe that I could be served.

Q. In other words, you did believe you would get service by asking for it?

[fol. 94] A. Yes.

Q. I see. And did you know of anyone else of your race that had received service there by asking for it?

A. At the lunch counter?

Q. At that counter?

A. I had heard of one or two that had gotten some type of service, I don't know what phase of it.

Q. Now, Reverend Ivory, you made some statement about something that the officers said to you. I ask you if you will repeat that, I want to be sure that I understood you correctly. When they first came up to the store?

A. When the officers first came up, I don't remember, I will do the best I can. When the officers first came into the store, as I recall, Captain Hunsucker said that he was going to request the manager to ask us to leave in his presence.

Q. All right, now where was the manager when that occurred?

A. Standing behind the counter.

Q. And weren't you engaged in a conversation with the manager when the officers came in, according to what you have already testified to?

A. We had previously been engaged in a conversation.

Q. And he was still out there?

A. He was still out there.

Q. At the time that the conversation you say took place, the manager was already there wasn't he?

A. Yes, sir, he was.

Q. Then what was, you say that the officer told you that he was going to ask the manager to ask you to leave?

A. To leave the store, in his presence.

[fol. 95] Q. Now, had not the manager already told you that he would not serve you?

A. He had already told me that he would not serve me, that he could not serve me.

Q. And did not the manager in the presence of the officers ask you to leave the store?

A. In the presence of the officers, after the officer had requested him to do so.

Q. And now I believe when you testified to that before, you said that you believed that that was what happened, is that your testimony now, or are you taking direct oath that there is no doubt about it?

A. I don't remember, and I still say I believe.

Q. You say you don't remember?

A. I say I still believe that that was the circumstance surrounding it. I want to be fair about it.

Q. I want you to be fair, and I don't want to leave something in the record that you don't think belongs in there, and I am asking you if you are certain that that is what happened?

A. I still say that I believe that is what happened.

Mr. Spencer: Your Honor, I ask that that testimony be stricken from the record on the grounds that this witness does not know and cannot testify under oath whether that is true or not, according to his own statement.

The Court: The witness can testify that he believes that this is the way the situation happened. Different people talk different ways, and say things in different ways, and whereas one person might say, "I know this is the way it happened;" another man might say, "I believe this is the way it happened." I don't think that there is any—

[fol. 96] Mr. Spencer: He said he didn't know. Then he said, "I don't know", and then he said, "I believe."

The Court: He qualified it as not definitely known by saying "I believe."

Mr. Spencer: May it please the Court, I will ask the Jury to weigh and determine it.

By Mr. Spencer:

Q. Reverend Ivory, were you not offered an opportunity to obtain a refund for your purchases at the quick service counter at the rear of the store before you were taken to the Police Station?

A. I requested, after the insistence and the seemingly impatience of the officers, I requested a refund for the articles that I had purchased, and told Mr. Whiteaker that if I would get, that if he would give me the refund, that I would leave the store.

Q. And didn't he tell you that the other place at which they were equipped to, or could give you a refund, was at the quick service counter?

A. Well, no, he didn't, he was not explicit, and I was in the process of finding out where the refund counter was, when the officer placed me under arrest.

Q. Were you offered an opportunity to receive a refund? As you were taken from the store?

A. As I reached the counter in the back of the store, where incidentally, there was a cash register, Captain Hunsucker, who was escorting me out of the store, slowed down at the counter, and asked me if I still wanted a refund, and I replied, "No," that I was under arrest, and that I would prefer keeping the articles as evidence of the fact that I had been served in the store.

Q. How much time elapsed between, you say you had finished your conversation with Mr. Whiteaker before the [fol. 97] officers arrived, how much time arrived, elapsed, that is, after he told you you could not be served, and he could not serve you, until the officers arrived on the scene?

A. I don't recall, Mr. Spencer, we had a brief, and as I said an amicable conversation. I was not specifically keeping track of the time. I really was not cognizant of how much time.

Q. Well, there was some elapsed time before the officers arrived?

A. There was a lapse of some time.

Q. And during that elapsed time, you had ample opportunity to leave the store, if you so desired? Did you not?

A. Well, yes, I suppose so, yes, I had time to leave.

Q. But you did not want to leave, and you did not leave, is that right?

A. Well, I had no reason at that particular time to leave. No one had voiced any displeasure at my being there. I was quite comfortable in the store.

Q. But you knew that you could not receive service and you were nevertheless remaining at the counter, where you could not be served, according to what you had been told, is that right?

A. Yes, that's true.

Mr. Spencer: I have no further questions.

The Court: Anything further?

Mr. Perry: Nothing further, sir.

The Court: All right, next witness.

(Witness excused.)

Mr. Perry: That concludes the defendant's case. Your Honor, we would ask that, we would like to raise some legal questions, and we would like to request a short recess. [fol. 98] The Court: All right, let's take a short recess. Off the record.

(Short recess.)

The Court: On the record. Now, Mrs. Pressley, you don't have to take down everything he says. Just get down the basic issues.

Mr. Perry: That's quite true. I was really prompted to make that remark during our first motion.

The Court: Well, I didn't know whether you wanted it in writing or not.

MOTION FOR DIRECTED VERDICT AND OVERRULING THEREOF

Mr. Perry: At this time, sir, we would like to move for a direction of verdict of not guilty for the defendant on the

same grounds which were advanced to the Court at the completion of the City's case, namely that there has not been established by competent evidence on the part of the City the *corpus delicti*. We would like a ruling on that motion at this time.

The Court: I will overrule the motion.

Mr. Perry: All right. At this time, sir, we move for a motion for directed verdict on the ground that the City had not prove a *prima facie* case of trespass against the defendant.

The Court: I will overrule that motion.

Mr. Perry: We now move for a directed verdict on the ground that the evidence shows that the, please indulge me for a second; this is a motion for direction of verdict on the ground that the evidence against the defendant, who is a Negro, in support of the warrant which charges him with trespass under the various statutes and municipal ordinances which have been recited to the Court, indicates that the defendant at the time of his arrest had accepted an invitation to enter and purchase articles in the store premises of McCrory's Five and Ten Cent Store, a store open to the public, but that he had not been allowed to obtain [fol. 99] food service on the same basis as that offered white persons on account of his race or color, and that in furtherance of this racially discriminatory practice of the McCrory Five and Ten Cent Store, the defendant was arrested on the basis of race or color, under cover of law, to enforce the McCrory Five and Ten Cent Company's discriminatory racial policy, thereby depriving the defendant of his rights under the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. That is the motion.

The Court: Well, I will overrule this motion also.

Mr. Perry: All right, sir. At this time the defendant moves for a directed verdict on the ground that the evidence against the defendant establishes that at the time of his arrest and at all times covered in the warrant in this matter, he was a member of the public, attempting to use a facility, to wit, a lunch counter at the McCrory Five and Ten Cent Store, which is open to the public, and which facility was denied to him solely on the ground of his race or

color, that the McCrory Five and Ten Cent Company's store was and is offering for a price to serve all members of the public with food; that with this public facility the McCrory Five and Ten Cent Store is, along with others of a similar nature, performing a necessary service for the public, which, in fact, would have to be provided by the State if McCrory's Five and Ten Cent Store and other like stores were all to withdraw from food service.

That having determined to offer said valuable service to the public, McCrory's Five and Ten Cent store is required to provide such service, in the manner of State-operated facilities of a like nature, to wit, that the McCrory Five and Ten Cent Store may not segregate or exclude this defendant on the ground of his race or color, or in violation of his rights under the Fourteenth Amendment to the United States Constitution.

The Court: I will overrule that motion also.

Mr. Perry: Very good, sir. Those are all our motions for a directed verdict.

The Court: How many arguments for the defense?

Mr. Sampson: Two, Your Honor, one five minutes and one not more than twenty.

Mr. Spencer: Five and twenty, I still haven't heard—

Mr. Sampson: Well—

Mr. Smith: Better make that ten and twenty, Your Honor.

Mr. Spencer: That will be time enough, we will operate within those limits.

The Court: Do you want to open?

Mr. Spencer: Yes, sir, and I will also close, and have nothing in reply.

Mr. Perry: Isn't that something? Do you hear that?

The Court: All right, let's have the jury, then.

Mr. Spencer, do you have anything in reply?

Mr. Spencer: Nothing in reply.

The Court: Proceed to argue to the jury, then.

(Arguments made to the jury.)

COURT'S CHARGE TO THE JURY

The Court: Mr. Foreman and Gentlemen, you are the sole judges of the facts in this case, and nothing I might say to you now, and nothing that I may say during the course of the trial and the ruling that I might have made has anything to do with how I feel about the facts, because I have no legal opinion or opinion of my own to express to you in that regard.

[fol. 101] You were selected yesterday after a number of names of registered voters in this City were pulled from a box, and after a process of elimination by the City and by the counsel for this defendant, as being the six men that they felt could best decide the issue being presented here this afternoon on this date.

Now, you don't have any friends to reward, you don't have any interest, you are interested in only one thing, and that is the truth of the issue being presented. The word "verdict" itself is derived from a Latin word, "*veredicto*", meaning "the truth", and that is what you are interested in. Now, in addition to being the sole judges of the facts in the case, you are also the sole judges of the credibility of the witnesses. By that we mean that it is up to you to say which witness or which witnesses or what part of the various witnesses' testimony that has been conveyed to you with truth of this issue.

Now, just as you are the sole judges of the credibility of the witnesses and the sole judges of the facts, the law makes me the sole judge of the law. Therefore, you have to take the law as I give it to you, and apply the facts as you find them from this witness stand. You don't have to have any specific yard-stick to measure this credibility to determine what is the truth. You may take the witnesses' demeanor on the witness stand. You may take his prejudice or his lack of prejudice, or anything that you wish to use as a yardstick to judge which witnesses have conveyed this truth to you.

Now, I am saying that the law makes me the sole judge of the law, and if I give you the law incorrectly then someone else can correct that law, but you see we work in sort of a dual capacity, and yet we work together. I give you

the law, and you take the law as I give it to you, and [fol. 102] not as you think it might or ought to be, not as you might wish it were, but as I give it to you, then you apply the facts as you find them.

Now, this defendant is charged under a warrant issued by the City of Rock Hill will the offense of trespass. I am not going to read this warrant to you. It has been read to you and it has been discussed, and you know what is in the warrant. If you want to know then what is meant by trespass, what does trespass mean, I am going to read to you a portion of an Act of the General Assembly which became law on the 16th day of May, 1960, reading you only a portion of it, and that portion which applies in this particular case.

"Any person who, having entered into a place of business or on the premises of another person, firm, or corporation, and fails and refuses without good cause or good excuse to leave immediately upon being ordered or requested to do so by the person in possession, or his agents or representatives, shall on conviction be fined not more than \$100.00 or be imprisoned for not more than thirty days."

Now, I have several requests to charge, several things that I will charge you in regard to trespass. I charge you in connection with trespass, or in connection with this case in general, that there is no South Carolina law, State or Municipal, pertaining to the segregation of the races at lunch counters and variety stores such as the one involved in this case, and that the policy of excluding Negroes or segregating them from white persons is a private custom only, without legal approval or disapproval.

I charge you further that a trespass is the doing of unlawful act, or of lawful acts in an unlawful manner, to the injury of another's person or property, an unlawful act committed with violence, actual or implied, [fol. 103] causing injury to the person, property, or relative rights of another, and an injury or misfeasance to the person, property, or rights of another, done with force and violence, either actual or implied in law.

It comprehends not only forcible wrongs, but also acts the consequences of which make them tortious, of actual

violence; an assault and battery is an instance; of implied, a peaceable but wrongful entry upon a person's land, or the wrongful remaining upon one's property after ordered to leave. Trespass to property is a crime at common law when it is accompanied by or tends to create a breach of the peace. When a trespass is attended by circumstances constituting breach of the peace it becomes a public offense, subject to criminal prosecution.

I charge you further that any person who, having entered into the place of business or on the premises of another person, firm or corporation, fails and refuses without good cause or good excuse to leave immediately upon being ordered to do so by the person in possession or their agent or representative, is guilty of trespass. That is somewhat of a repetition of what I charged you earlier.

I charge you that the occupant of any house, store, or other building has the legal right to control it, and to admit whom he pleases to enter and remain there; and that while the entry by one person on the premises of another may be lawful by reason of express or implied invitation to enter, his failure to depart on the request of the owner will make him guilty of trespass.

I charge you that the words "without good cause or without good excuse", as used in reference to the refusal of one person to leave the premises of another when ordered by the other in charge thereof to do so, are defined to mean "without good legal cause or good legal excuse." [fol. 104] or in other words, the cause or excuse must be one valid in the eyes of the law, and under existing circumstances, not merely a personal cause or excuse of insufficient stature to have any legal force; and that determination of good cause or good excuse is a question of fact for you, gentlemen of the jury.

Now, this defendant came into this courtroom and entered a plea of not guilty. Therefore, the City must satisfy you of his guilt beyond a reasonable doubt. That presumption of innocence, so to speak, remains with him throughout the deliberations of this trial and throughout your deliberations in the Jury Room, and until and unless that presumption has been removed from your minds beyond a reasonable doubt.

Now, by reasonable doubt we mean exactly what the word says, not just a plain or a fanciful or an imaginary doubt which you might have about anything, but a doubt for which you can give a reason. If you have a doubt for which you can give a reason as to the guilt or innocence of this person, then you would find the defendant not guilty. When you have determined the facts, and all of you must agree upon your verdict, when you have determined the facts as you see them, you have applied the law as I have given it to you to those facts; I am going to ask you, Mr. Foreman and gentlemen, to take the arrest warrant and on the reverse side thereof, you will find down towards the bottom the printed words, "Jury Verdict." Now, Mr. Foreman, if this jury finds this defendant guilty, upon the line indicated you will write the word, "Guilty", and today's date, and sign your name as foreman. If you find this defendant not guilty, write the words, "Not Guilty", and sign your name as foreman, and add the date. [fol. 105] And on the exhibits, the only exhibits that we have are these that are here in this trash can, you may take them with you if you wish, or you may leave them here, at your pleasure.

All right, Mr. Foreman, if you will, then, take the warrant and the exhibits, and they will show you where you will go, and bring us back the exhibits.

(End of Charge.)

(Jury retired to consider their verdict.)

The Court: I would like for the counsel to give me their attention one moment, please. Under the law of the State of South Carolina it is my duty at this time to ask if either the counsel for the City or the counsel for the defendant has additional requests to charge which they would like to pass up, or to say at this time.

Mr. Spencer: Nothing from the City, Your Honor.

Mr. Perry: Your Honor, could we have our request for charges Nos. 2, 3 and 4, entered into the record? Shall I read them out, or can we have the Court order them written into the record?

The Court: Well, I certainly think you have the right to put in the record those charges you asked me to charge, but I refused.

Mr. Perry: That is what I mean.

The Court: I would say that I did refuse them, because I didn't think they went quite far enough.

Mr. Perry: I understand, sir.

The Court: In other words, I don't necessarily find anything wrong with the charge as written, if you had added a little bit more to it.

Mr. Perry: I see.

The Court: You don't—

Mr. Spencer: It was my view that the City would object to Charges 2, 3 and 4 requested by the defendant.

[fol. 106] The Court: All right.

Mr. Perry: We anticipated that.

The Court: But I think they have the right to put them in the record.

Mr. Spencer: Oh, yes, no objection to them being incorporated in the record.

The Court: Then I take it that is agreed.

(Following are Defendant's Requests for Charge, Nos. 2, 3, and 4, as referred to above.)

2. I charge you that the State of South Carolina cannot use its power, whether it be the legislative, executive or judicial, for the purpose of aiding or furthering a private plan or custom of excluding or segregating Negroes at lunch counters in variety stores.

3. I charge you that if you find that by arresting the defendant in this case, the police officers of the City of Rock Hill, South Carolina, were aiding or acting in furtherance of the store management in refusing service to the defendant on account of his race or color, you must find for the defendant.

4. I charge you that, if you find from the evidence the defendant was peacefully upon the premises of McCrory's 5 & 10 cent store by invitation of the management, unaccompanied by any disorderly or offensive conduct, and that the management withdrew the invitation when

the defendant entered the lunch counter area solely on the basis of the defendant's race or color, that this would not be a trespass under the laws of the State of South Carolina, and you must find for the defendant.

(End of Request for Charge.)

The Court: Then I take it that there is nothing further.

Mr. Sampson: May it please the Court, if you will indulge us, we would like to make a request here based [fol. 107] on your interpretation. Under this new statute, as I understand the cut, you said that the defendant had the duty of showing good cause or good excuse. I might say in that connection that first of all, and I didn't recall, the first thing, may it please the Court, as to this part of good excuse and so forth, that is a defense. I am not saying that the Court did not say so, but as I recall, I don't recall any instruction that the burden is on the defendant to show this, but he doesn't have to show it beyond a reasonable doubt, but rather by contrast of the evidence; in other words, it is the duty upon the City to show beyond a reasonable doubt, in this particular defense that burden is not beyond a reasonable doubt, that is normally charged; and another thing I would like to ask is simply this, sir.

This matter of arrest, if the burden is on the defendant to show good cause or good excuse, I would think that this testimony as to him not being served, and "If you didn't leave I am going to arrest you," and so forth, would possibly warrant an instruction commonly given in arrest cases along this line, that a private citizen has a right to inquire of an officer as to why he is being arrested. I am not totally sure on that, but as I understand the evidence here, the burden here is on him, he is talking to this man about this, and the officer came up and arrested him.

Now, I think that the Court is well versed on the question of whether his burden, as to whether the private citizen has a right to inquire of the officers as to why he is being arrested; and correspondingly, the police officer has a duty, and moreover it is an affirmative duty, to explain or inform as to why he is being arrested.

[fol. 108] Now, as I understand it, that was not done in this case. I am not talking about the charge, I am talking about when the inquiry was made by the defendant.

The Court: Yes, I think that was proper.

Mr. Sampson: Just one moment before you reply to that, there is one other thing that bothers me in the question of charge, and that is this. I don't have the citation for this, but I think it is general law, I wrote it down like this, that an arrest or an arrest or conversion of the liberty of a person based purely on the color of the defendant, in and of itself, is in and of itself purely on his color, unlawful under the law in South Carolina.

Where you arrest a defendant purely because of his color, and no other circumstance or anything else, it would be unlawful, and I have in mind where segregation is stated, where you have got a policy and a reason given by the State to arrest this man, to say if he goes onto a bus, or in the case of the park, I believe, Mr. Perry, where the statute clearly says that this City has \$50,000.00, or if it would say this is required by law and so forth, that would be another matter, but here where it is already conceded by counsel for the City and quite ably by the Court, and part of this question, that it would be proper since the color is a matter in here, if it is the law, then to charge that arrest based purely on color in and of itself without anything else would be unlawful and illegal in this State, and if it be in order we would like to get a charge to that effect.

Mr. Spencer: If it please the Court, responsive to the further request to charge by defense counsel, I don't know that I would take any particular issue with his last statement that an arrest made purely on color alone would not be supported, but I submit that the record in this case does not warrant such a charge, and the facts [fol. 109] show that the arrest was made based on violation of the law against trespass, and that there is no, he is presupposing that race is the only reason involved, and I would submit that that would not be properly warranted or sustained by the testimony, and the other thing is that on the testimony as to the defendant being advised, I submit that defense counsel is taking the version

of the defendant only as to what occurred, and the record will clearly show that Officer Hunsucker affirmatively testified that he positively advised the defendant that he was arresting him for trespass, and would do so if he did not leave the premises. That is my clear recollection; that is what the record shows.

The Court: Well, I think the request is in the nature of 2, 3, and 4 of your requests, and I don't believe I will charge that. However, I will charge those other two items if you want me to.

Mr. Thompson: I will ask you that you do so, thank you, Your Honor.

The Court: Ask the jury to come in.

(Jury brought in.)

Further Charge

The Court: Mr. Foreman and gentlemen, I hate to call you back so quickly, but there are two things that I wanted to tell you in connection with my charge which I overlooked, and it was brought to my attention by counsel.

In charging you those two items, you are not to attach any more significance to this than anything else I have said during the course of the charge as previously made, they are just out of order because I did not charge you; but one thing I want to charge you is that [fol. 110] if any person is placed under arrest, he is entitled to have notice of that arrest.

Now, by implication, an officer may show his warrant, or if he is known to the defendant, then that gives him notice; but simply to restrain a man who is neither told nor suspects the reason, is not correct.

One arresting, whether he is an officer or whether he might be a private individual, under those circumstances in which you and I as private individuals can make an arrest, must make it known to the defendant the purpose of the arrest.

Now, the particular circumstances may render it plain; if they do, and if in the event the defendant were to resist, for example, following that, the resistance would be

—in other words, it can be rendered as though stated in words. However, the defendant is entitled to know what he is being arrested for. It is the duty of the officer to inform the person what he is being arrested for.

Now, one other thing that I overlooked is, in reading this section to you, I read you this portion which says, "If a person fails and refuses to leave after having been asked to leave, and fails and refuses to do so without good cause and good excuse," in other words it sort of becomes what you might say an affirmative defense, it is up to the defendant to show this good cause.

However, he is not subjected to the test of showing that beyond a reasonable doubt, as the State is in showing the elements of the crime and then making out the crime.

In other words, he doesn't have to show that beyond a reasonable doubt, he doesn't have to go that far.

All right, thank you, gentlemen.

(Jury retired again to consider their verdict.)

[fol. 111] The Court: You don't have to be seated, just come back in for just a moment. The Foreman of the jury, has indicated to me that there might be a question that he might want to ask the Court. I would like to say to you, Mr. Foreman, that if it is a question of law, a question involving the law of the case, I will be glad to help you with it, but if it is a question involving facts, I can't answer the question for you. You may ask the question, and I will answer it if I can. If I can't, I will just tell you so.

The Foreman: Well, it is a question involving the testimony.

The Court: Well, that would be a question of fact, and I couldn't comment on that.

You might want to propound the question, and then I will let you go on back to your room and we will see if maybe then between counsel we can work it out.

The Foreman: Was the defendant, when notified that he would be placed under arrest, if he failed to leave, notified that he would be arrested for what offense?

The Court: All right. You go ahead. That is a question of fact which I can't comment on, but you gentlemen go on back to the jury room, and we will come up with some answer and call you back.

(Jury retired to consider their verdict.)

(Jury recalled to the Courtroom.)

The Court: Mr. Foreman and gentlemen, we have tried to answer your question that was asked a few minutes ago. I want to say that there is testimony from the City that the defendant was informed that he was being charged with trespass at the time of the arrest, and there is testimony from the defendant that he was not informed of what he was charged with when he was arrested, and therefore it [fol. 112] leaves to you the question of fact, a question that you will have to judge from the witnesses' testimony.

(Jury retired again to consider their verdict.)

(Jury recalled to courtroom.)

The Court: The Court will come to order. *The City of Rock Hill v. Reverend C. A. Ivory*, offense trespass.

THE JURY VERDICT

"We find the defendant guilty, George W. Mozingo, Jr., Foreman," dated today.

Mr. Foreman and gentlemen, is this your verdict, so say you all?

Answer: (By the ~~Jury~~) Yes.

The Court: On behalf of the City of Rock Hill and this defendant, I want to thank you for your attendance on this trial, and I appreciate your kind consideration which you have given to this Court, and Counsel for the City and Counsel for the Defendant and the various witnesses who have testified. You have been very patient. There isn't any pay attached to this job, and as I often tell jurors, as taxpayers you would end up paying it anyway, so I don't guess it makes much difference.

You may stay as long as you wish, or you may leave any time you so wish.

Mr. Perry: May it please the Court, I am awfully sorry, I didn't intend to interfere with your departure.

The Foreman: That's all right.

MOTIONS FOR ARREST OF JUDGMENT, OR IN THE ALTERNATIVE,
FOR A NEW TRIAL, AND OVERRULING THEREOF

Mr. Perry: May it please the Court, the defendant at this time moves for arrested judgment, or in the alternative, for a new trial.

Now, I would like to indicate here that this motion for arrest of judgment, or in the alternative, for a new trial, is based upon all motions and all grounds for direction of verdict which were urged to the Court at the conclusion of the defense case. I would like to request that they be repeated in the record verbatim as they were made at [fol. 113] that time. This time, however, under the guise of a motion for arrested judgment, or in the alternative, for a new trial, I think that I will save some time by doing it that way, rather than at this time myself repeating them in the record.

The Court: All right, sir.

Mr. Perry: At this time, sir, we would like to move for arrest of judgment, or, in the alternative, for a new trial on the same grounds that were advanced to the Court at the completion of the City's case, namely, that there has not been established by competent evidence on the part of the City the *corpus delicti*.

We move for arrest of judgment, or in the alternative, for a new trial on the ground that the City had not proved a *prima facie* case of trespass against the defendant.

We now move for arrest of judgment, or, in the alternative, for a new trial, on the ground that the evidence shows that, the evidence against the defendant, who is a Negro, in support of the warrant which charges him with trespass under the various statutes and municipal ordinances which have been recited to the Court, indicates that the defendant at the time of his arrest had accepted an invitation to enter and purchase articles in the store premises of McCrary's Five and Ten Cent Store, a store open to the public, but that he had not been allowed to obtain food service on the same basis as that offered white persons on account of his race or color, and that in furtherance of this racially discriminatory practice of the McCrary Five and Ten Cent Store, the defendant was arrested on the

basis of race or color, under cover of law, to enforce the McCrary Five and Ten Cent Company's discriminatory racial policy, thereby depriving the defendant of his rights under the equal protection and due process clauses of the [fol. 114] Fourteenth Amendment to the United States Constitution.

At this time the defendant moves for arrest of judgment, or in the alternative, a new trial, on the ground that the evidence against the defendant establishes that at the time of his arrest and at all times covered in the warrant in this matter, he was a member of the public, attempting to use a facility, to wit, a lunch counter at the McCrary Five and Ten Cent Store, which is open to the public, and which facility was denied to him solely on the ground of his race or color, that the McCrary Five and Ten Cent Company's store was and is offering for a price to serve all members of the public with food; that with this public facility the McCrary Five and Ten Cent Store is, along with others of a similar nature, performing a necessary service for the public, which, in fact, would have to be provided by the State if McCrary's Five and Ten Cent Store and other like stores were all to withdraw from food service.

That having determined to offer said valuable service to the public, McCrary's Five and Ten Cent Store is required to provide such service in the manner of State-operated facilities, of a like nature, to wit, that the McCrary Five and Ten Cent Store may not segregate or exclude this defendant on the ground of his race or color, or in violation of his rights under the Fourteenth Amendment to the United States Constitution.

The Court: All right, I will overrule the motions.

Mr. Perry: All right, Sir.

I would also like to move for an arrest of judgment, or in the alternative, for a new trial, on the ground that the Court erred in refusing to charge the jury in accordance with the defendant's requests for charges Nos. 2, 3, and 4, [fol. 115] all of which charges have been ordered reproduced in the record by the Court.

The Court: Okay, I overrule that motion also. Is there anything further?

Mr. Perry: At this time, may it please the Court, the defendant notes a Notice of Intention to Appeal verbally, and we state to the Court that we will tender written notice of intention to appeal, together with exceptions, within the statutory period. We ask that the Court set an appeal bond.

The Court: According to our arrangements before, you would have until, of course you can have until eight o'clock tomorrow night anyway.

Mr. Spencer: To mail it.

The Court: Well, yes, to mail it, to get it in the mail.

Mr. Perry: Very good, sir.

The Court: Is that fair enough, sir?

Mr. Perry: That's fair enough, sir.

The Court: Is there anything you want to say, anything further in connection with this before sentencing of the defendant?

Mr. Perry: I can think of nothing further, sir, but Your Honor is able to observe that he is a paralytic, and he is a minister of the Gospel, and most ministers are not very well paid, and I hope that Your Honor will take into consideration these factors in passing sentence upon him.

Mr. Spencer: May it please the Court, I feel that it is incumbent upon me to point out on the part of the City, that it is the view of the City that the defendant has been found guilty by this jury of willfully and unlawfully committing a trespass, which means that he has done so knowingly and with purpose and intent, and I submit, Your Honor, that he, in view of everything that has gone on, that I feel sure that this defendant well knew what would [fol. 116] be the consequences of his act, and that as was just stated by defense counsel in argument to the jury, that if they found this defendant guilty, that that doesn't mean he is going to stop, that he is going to keep on again, I submit that that sort of attitude does not warrant mitigation, and ask the Court to impose maximum fine.

SENTENCING OF DEFENDANT

The Court: All right, I fine the defendant, Reverend C. A. Ivory, \$100.00, or be confined in the City Jail or in the public works for such works as he may be able to perform for York County, South Carolina, for a term of thirty (30) days.

Your appeal bond will be \$200.00.

Mr. Perry: All right, sir.

(Whereupon, at eight o'clock p.m. on June 29, 1960, the trial in the above-entitled matter was closed.)

**SECTION 19-12 CODE OF LAWS OF CITY
OF ROCK HILL**

Chapter 19. Section 12. Entry on lands of another after notice prohibiting same.

Every entry upon the lands of another, after notice from the owner or tenant prohibiting the same, shall be a misdemeanor. Whenever any owner or tenant of any lands shall post a notice in four conspicuous places on the border of any land prohibiting entry thereon, and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county where such lands situate, a proof of the posting and publishing of such notice within twelve months prior to the entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for hunting and fishing.

[fol. 117] IN THE SIXTH JUDICIAL CIRCUIT COURT,
YORK COUNTY, STATE OF SOUTH CAROLINA

ORDER AFFIRMING CONVICTIONS—December 29, 1961

This Court now has before it for consideration a total of seventy-one cases which were heard by the Recorder's Court for the City of Rock Hill. The convictions of all defendants were in due time appealed to this Court and heard together by this Court on an agreed Transcript of Record. By occurrence and charge the cases are grouped as follows:

1. Sixty-five breach of peace charges, upon the public streets at City Hall, on March 15, 1960.
2. Three breach of peace charges, upon the public streets at Tollison-Neal Drug Store, on February 23, 1961.
3. One Trespass charge within McCrory's variety store, on April 1, 1960, before enactment of the 1960 Trespass Act (No. 743).
4. Two Trespass charges, within McCrory's variety store on June 7, 1960, after enactment of the 1960 Trespass Act.

An examination of the Transcript of Record on Appeal discloses no real distinction between the first sixty breach of peace cases at City Hall, the next five on the same day at the same place only a short time later, and the three breach of peace cases on the public streets at Tollison-Neal Drug Store. In all of these cases it appears from the record that the public peace was endangered, that the defendants were properly forewarned by a police officer to cease and desist from further demonstrations at that time and place, and move on, which they failed and refused to do, despite allowance of ample time within which to have complied with the order, and that thereafter they were arrested and charged with breach of peace as continuance of their activities under the circumstances then existing, as shown [fol. 118] by the record, constituted open defiance of proper and reasonable orders of a police officer and tended with sufficient directness to breach the public peace.

The offense charged in each of the sixty-eight breach of peace cases is clearly made out under the facts shown by the Transcript of Record and the law of force in this state, particularly as the law is shown by the recent decision of the South Carolina Supreme Court in the case of *State v. Edwards et al.*, Opinion No. 17853, filed December 5, 1961.

In like manner this Court finds no distinguishing features between the one trespass case, which occurred at one time and place and the two later trespass cases at the same place. In all three cases each defendant was asked to leave the premises by the Manager of the store, this occurred in the presence of a City police officer, who then himself requested each defendant to leave and explained that arrest would follow upon failure to leave. After each defendant

failed to leave the private premises involved, following allowance of a reasonable opportunity after request so to do, first by the Manager and then by the police officer, each defendant was arrested and charged with trespass. Here again, under the facts disclosed in the record and the law of force in this state, the charge of trespass is properly made out as to each defendant. See *City of Greenville v. Peterson et al.*, S. C. Supreme Court Opinion No. 17845, filed November 10, 1961, and *City of Charleston v. Mitchell et al.*, S. C. Supreme Court Opinion No. 17856, filed December 13, 1961.

A number of specific legal questions were raised by the Defendants, including particularly a question as to adequacy and sufficiency of the warrants and whether or not the Defendants were properly advised of the charges pending [fol. 119] against them. An examination of the warrants discloses that in each case the facts constituting the offense charged were stated with reasonable and sufficient particularity. It is the opinion of this Court that the various legal objections raised in the Court below, which are not set forth in detail herein, were properly overruled. See *State v. Randolph et al.*, 239 S. C. 79, 121 S. E. (2d) 349, filed August 23, 1961, other authorities cited herein, and other applicable decisions of our Courts referred to in the cited authorities.

Accordingly, it is hereby *ordered and decreed* that the convictions by the Recorder's Court of the City of Rock Hill in all of the seventy-one cases under appeal are hereby affirmed, and each of the cases is remanded for execution of sentence as originally imposed.

This Court takes note, from published reports, of the untimely death of the Defendant, Rev. C. A. Ivory, since hearing of the appeals herein and before rendering judgment thereon.

All of which is duly ordered.

GEORGE T. GREGORY, JR.

Residing Judge, Sixth Judicial Circuit.

Chester, S. C.

December 29, 1961.

IN THE SIXTH JUDICIAL CIRCUIT COURT

EXCEPTIONS

1. The Court erred in refusing to require the City of Rock Hill to make the warrant more definite and certain by specifically setting forth and alleging which statute or ordinance it was claimed appellant had violated, in violation of Article I, Section 18, Constitution of the State of South Carolina and in violation of appellant's right to due [fol. 120] process of law, guaranteed by the Fourteenth Amendment to the United States Constitution.
2. The Court erred in refusing to require the City of Rock Hill to elect whether it would proceed under Section 16-386, Code of Laws of South Carolina for 1952, or Section 16-388, Code of Laws of South Carolina for 1952, or Section 19-12, Code of Laws of the City of Rock Hill, in violation of Section 15-902, Code of Laws of South Carolina for 1952.
3. The Court erred in refusing to hold that appellant was convicted upon a record devoid of any evidence of the commission of any of the essential elements of the crime charged, in violation of appellant's right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution, and by Article I, Section 5 of the South Carolina Constitution.
4. The Court erred in refusing to hold that the evidence shows conclusively that by arresting appellant, the officers were aiding and assisting the owners and management of McCrory's Five and Ten Cent Store in maintaining their policies of segregating or excluding service to Negroes at their lunch counters on the ground of race or color, in violation of appellant's right to due process of law and equal protection of the law, secured by the Fourteenth Amendment to the United States Constitution.
5. The Court erred in refusing to hold that the evidence offered against appellant, a Negro, establishes that at the time of his arrest, he was attempting to use a facility, the lunch counter of McCrory's Five and Ten Cent Store, open to the public, which was denied him solely because of race

and color, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

IN THE SIXTH JUDICIAL CIRCUIT COURT

AGREEMENT

It is hereby stipulated and agreed by and between counsel for the appellant and respondent that the foregoing, when printed, shall constitute the Transcript of Record herein and that printed copies thereof may be filed with the Clerk of the Supreme Court and shall constitute the Return herein,

DANIEL R. MCLEOD,
Attorney General,
Columbia, South Carolina.

GEORGE F. COLEMAN,
Solicitor, Sixth Judicial Circuit,
Winnsboro, South Carolina,

SPENCER & SPENCER,
Rock Hill, South Carolina,
Attorneys for Respondent.

JENKINS & PERRY,
Columbia, South Carolina.

By: MATTHEW J. PERRY,
DONALD JAMES SAMPSON,
WILLIS T. SMITH, JR.,
Greenville, South Carolina,
Attorneys for Appellant.

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 122]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4912

CITY OF ROCK HILL, Respondent,

v.

ARTHUR HAMM, JR., Appellant.

Appeal from York County.

George T. Gregory, Jr., Judge

Affirmed

Jenkins & Perry, of Columbia; Donald James Sampson and Willie T. Smith, Jr., both of Greenville, for appellant.

* Attorney General Daniel R. McLeod; Assistant Attorney General Everett X. Brandon, both of Columbia; Solicitor George F. Coleman, of Winnsboro; and Spence & Spence, of Rock Hill, for respondent.

OPINION NO. 18000—FILED DECEMBER 6, 1962

Moss, A. J.; Arthur Hamm, Jr., the appellant herein, was convicted in the Recorder's Court of the City of Rock Hill on June 29, 1960, of the charge of trespass, in violation of Section 16-388 (2) as is contained in the 1960 Cumulative Supplement to the 1952 Code of Laws of South Carolina. The judgment of conviction was affirmed on December 29, 1961, by the Honorable George T. Gregory, Jr., Resident Judge of the Sixth Circuit. This appeal followed.

The evidence shows that on June 7, 1960, the appellant, along with Rev. C. A. Ivory, now deceased, entered the premises of McCrory's Five and Ten Cent Store in the City of Rock Hill, South Carolina. Ivory was a cripple and confined to a wheelchair. He was pushed into the store

by the appellant. Ivory and the appellant proceeded down the aisles of the store and made one or two purchases. Thereafter, they proceeded to the lunch counter operated by McCrory's. Ivory, still in his wheelchair, came to a stop between the stools at the said counter. The appellant took a seat on a stool at the lunch counter. The appellant and Ivory sought to be served. They were not served and were asked to leave the lunch counter. Upon their refusal to leave at the request of the manager of McCrory's store, they were placed under arrest by police officers of the City of Rock Hill.

The first question for determination is whether the City Recorder committed error in refusing to require the City of Rock Hill to elect whether the prosecution was under Section 16-386 or Section 16-388, Code of Laws of South Carolina, or Section 19-12, Code of Laws of the City of Rock Hill:

It should be borne in mind that the warrant charged the appellant with committing a trespass on June 7, 1960, and that he,

"did willfully and unlawfully trespass upon privately owned property by remaining along with one Rev. C. A. Ivory at the lunch counter in McCrory's variety store, which is customarily operated upon a segregated basis, and refusing to leave said counter, after the Manager of said store, in the presence of City Police Capt. John M. Hunsucker, Jr., advised him he would not be served and specifically requested him to leave said lunch counter, and after the aforesaid police officer thereupon advised him that he would be arrested for trespass unless he left said premises as directed, which he nevertheless failed and refused to do. * * *."

The appellant asserts that under Section 15-902 of the 1952 Code of Laws of South Carolina that whenever a person is accused of committing an act which is susceptible of being designated as several different offenses [fol. 123] that the Municipal Court upon a trial of such person shall be required to elect which charge to prefer and a conviction of an offense upon such an elected charge

shall be a complete bar to further prosecution for the alleged offense. An examination of the warrant here shows that the only offense charged against the appellant was that of a trespass and the warrant above quoted, in our opinion, charges a violation of Section 16-388 of the 1960 Cumulative Supplement to the Code, which provides that:

“Any person:

“(2) Who, having entered into the dwelling house, place of business or on the premises of another person • • • and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

“Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.”

The warrant under which the appellant was prosecuted plainly and substantially sets forth the acts of the appellant and thus informed him of the nature of the offense against him, in accordance with Section 43-111 of the 1952 Code, *City of Charleston v. Mitchell, et al.*, 239 S. C. 376, 423 S. E. (2d) 512, and *City of Greenville v. Peterson, et al.*, 239 S. C. 298, 122 S. E. (2d) 826.

This case was tried by the Recorder of the Municipal Court of Rock Hill, with a jury. The Recorder, in delivering his charge to the jury, gave the following instructions:

“Now, this defendant is charged under a warrant issued by the City of Rock Hill with the offense of trespass. I am not going to read this warrant to you. It has been read to you and it has been discussed, and you know what is in the warrant. If you want to know then what is meant by trespass, what does trespass mean, I am going to read to you a portion of an Act of the General Assembly which became law on the 16th day of May, 1960, reading you only a portion of it, and that portion which applies in this particular case.”

“Any person who, having entered into a place of business or on the premises of another person, firm, or cor-

poration, and fails and refuses without good cause or good excuse to leave immediately upon being ordered or requested to do so by the person in possession, or his agents or representatives, shall on conviction be fined not more than \$100.00 or be imprisoned for not more than thirty days."

It is readily apparent that the Recorder submitted to the jury only the question of whether the appellant was guilty of the offense of trespass as is defined by an Act of the General Assembly, approved May 16, 1960, 51 Stat. 1729, now incorporated in the 1960 Supplement to the Code as Section 16-388 (2).

Should the City Recorder have required an election by naming the statute under which the prosecution was brought? We think not. The warrant here charged a single offense of trespass upon facts which are not in dispute. In 27 Am. Jur., Indictments and Informations, Section 133, at page 691, we find the following:

" * * * There need, of course, be no election where the indictment or information charges only one offense and the several different counts are merely variations or modifications of the same charge. This rule has been applied to an indictment where an unlawful act relied on by the state as the basis for the charge was made unlawful by more than one statute, ~~it~~ being held that in such case it is error to compel the state to elect upon which statute it relies for a conviction * * *"
State v. Schaeffer, 96/Ohio St. 215, 117 N. E. 220.

In 42 C. J. S., Indictments and Informations, Section 185, at page 1149, we find the following:

" * * * No election is necessary where the indictment, properly construed, charges but one offense although [fol. 124] several acts comprising the offense are included, or several methods by which the offense may have been committed are stated. The prosecuting attorney is not required to state at the trial the particular section of the code under which accused is being tried where the offenses or acts with which ac-

eused is charged are fully set out, nor is he required to elect where the offenses defined by the various statutes are included within the crime charged, * * *."

And again:

" * * * Although no express statement of election is made by the prosecution, accused is not prejudiced where the trial in fact proceeds on only one charge, or appropriate instructions are given to the jury. * * *

There is nothing substantial in the objection that the City Recorder refused to require the City of Rock Hill to elect the particular statute upon which the prosecution was based. The warrant charged a single offense of trespass and the Recorder submitted to the jury only the question of whether the appellant was guilty of trespass as such was defined in the statute heretofore cited. There was no prejudice to the appellant.

The record shows that the appellant and the Rev. C. A. Ivory are Negroes. It was the policy of McCrory's store not to serve Negroes at its lunch counter. The appellant asserts by exceptions 3, 4 and 5 that his arrest by the police officers of the City of Rock Hill and his conviction of trespass that followed was in furtherance of an unlawful policy of racial discrimination and constituted State action in violation of his rights to due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Identical contention was made, considered and rejected in the cases of *City of Greenville v. Peterson, et al.*, 239 S. C. 298, 122 S. E. 2d 826; *City of Charleston v. Mitchell, et al.*, 239 S. C. 376, 123 S. E. (2d) 512; *City of Columbia v. Barr, et al.*, 239 S. C. 395, 123 S. E. (2d) 521, and *City of Columbia v. Bouie, et al.*, 239 S. C. 570, 124 S. E. (2d) 332, in each of which was involved a sit-down demonstration similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was McCrory's in the case at bar.

All exceptions of the appellant are overruled and the judgment appealed from is affirmed.

Affirmed.

TAYLOR, C.J., LEWIS and BRAILSFORD, J.J., concur. BUSSEY, A.J. did not participate.

[fol. 125] PETITION FOR REHEARING AND PETITION FOR STAY OF REMITTITUR (omitted in printing).

[fol. 128] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

ORDER DENYING PETITION FOR REHEARING AND PETITION FOR STAY OF REMITTITUR—Filed January 11, 1963

Petition denied.

C. A. Taylor, C. J., Joseph R. Moss, A. J., J. Woodrow Lewis, A. J., J. M. Brailsford, A. J.

[fol. 129] PETITION FOR STAY OF SENTENCE—January 18, 1963 (omitted in printing).

[fol. 131]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4912

CITY OF ROCK HILL, Respondent,

against

ARTHUR HAMM, Appellant.

ORDER STAYING SENTENCE—January 18, 1963

On the 6th day of December, 1962, we issued an Opinion in the above case, affirming the judgment of the Court of General Sessions for York County which sustained the judgment of the Recorder's Court of Rock Hill, South Carolina, wherein appellant was convicted of the common law offense of breach of peace.

Thereafter, appellant filed a Petition for Rehearing and, on January 11, 1963, the said Petition was denied.

Appellant has now indicated that he desires and intends to file in the Supreme Court of the United States a Petition for Writ of Certiorari, seeking review of our judgment in said cause. Under the rules and decisions of the United States Supreme Court, he has ninety (90) days after the final judgment of this Court, within which to file his Petition for Writ of Certiorari. The final judgment of this Court is the Order, denying rehearing. *Department of Banking, State of Nebraska v. Pink*, 65 S. Ct. 253, 217 U. S. 264, 87 L. Ed. 254. He desires a stay of the sentence in this [fol. 132] matter pending the filing of his Petition for Writ of Certiorari in the United States Supreme Court and thereafter until said matter has been disposed of by that Court. It appears that the request for stay of sentence is proper. Now, on motion of Counsel for the appellant, by and with the consent of Counsel for the respondent,

It Is Ordered that the execution of the sentence herein be stayed for a period of ninety (90) days after the day of the final judgment of this Court in order that petitioner

may file with the United States Supreme Court his Petition for Writ of Certiorari.

It Is Further Ordered that if a notice from the Clerk of the United States Supreme Court that the Petition for Writ of Certiorari has been filed in that Court is filed with the Clerk of the Supreme Court of South Carolina within the time aforesaid, the stay of execution of sentence herein shall continue in effect until final disposition of the case by the Supreme Court of the United States.

January 18, 1963

C. A. Taylor, Chief Justice.

We Consent:

Daniel R. McLeod, Attorney General, E. N. Brandon,
Assistant Attorney General.

[fol. 133] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 134]

SUPREME COURT OF THE UNITED STATES.

No. 105—October Term, 1963

ARTHUR HAMM, JR., Petitioner,

vs.

CITY OF ROCK HILL.

ORDER ALLOWING CERTIORARI—June 22, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED

APRIL 01 1963

JOHN F. DILLON, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. ~~1889~~

2

ARTHUR HAMM, JR.,

Petitioner,

—v.—

CITY OF ROCK HILL.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

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IN THE
Supreme Court of the United States

October Term, 1962.

No.

ARTHUR HAMM, JR.,

Petitioner,

—v.—

CITY OF ROCK HILL.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on December 6, 1962, rehearing of which was denied January 11, 1963.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina is reported at 128 S. E. 2d 907. It is set forth in the Appendix hereto, *infra* p. 5a. The order of the York County Court is unreported and is set forth in the Appendix hereto, *infra* p. 1a.

Jurisdiction

The judgment of the Supreme Court of South Carolina was entered on December 6, 1962, *infra* p. 5a. Petition for rehearing was denied by the Supreme Court of South Carolina on January 11, 1963, *infra* p. 11a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), petitioner having asserted below, and claiming here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Whether petitioner, a Negro, was denied due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States by the use of the state executive and judicial machinery to arrest and convict him of trespass where he had attempted to obtain service at a lunch counter previously reserved for whites in a store entirely open to the public?
2. Whether petitioner was denied due process of law secured by the Fourteenth Amendment in that the city was not required to elect a statute under which to prosecute but was permitted to rely on all the "available" law, including, but not limited to, three statutes which overlapped but were not coextensive, and in that petitioner was convicted and sentenced for the general offense of "trespass" without ever being informed of which statute—or common law rule—he had allegedly breached?

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.
2. This case also involves Section 16-386, Code of Laws of South Carolina, 1952, as amended 1954:

Entry on another's pasture or other lands after notice; posting notice

Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

3. This case also involves Section 16-389 (2), Code of Laws of South Carolina, 1952, as amended 1960:

Any person:

- (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or
- (2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative, shall on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

4. This case also involves Section 19-12, Code of Laws of City of Rock Hill:

Entry on lands of another after notice prohibiting the same

Every entry upon the lands of another, after notice from the owner or tenant prohibiting the same, shall be a misdemeanor. Whenever any owner or tenant of any lands shall post a notice in four conspicuous places on the border of any land prohibiting entry thereon, and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county where such lands situate, a proof of the posting and publishing of such notice within twelve months prior to the entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for hunting and fishing.

Statement

Petitioner Hamm, a Negro student, was arrested for a sit-in demonstration at the lunch counter of McCrory's dime store in Rock Hill, South Carolina on June 7, 1960. (R. 14). He was convicted of trespass and sentenced to pay a fine of \$100.00 or spend thirty days in jail (R. 116).

Hamm, along with Reverend C. A. Ivory, a Negro, now deceased, entered McCrory's dime store on June 7, 1960 in order to buy notebook paper and a trash can (R. 92). After the purchases were made, Reverend Ivory suggested to the petitioner that they eat at the lunch counter in the store (R. 84, 85). Reverend Ivory testified that he had heard of "one or two" Negroes who had "gotten some type of service" at the lunch counter (R. 94). Asked on cross-examination whether he believed he could obtain service, he replied, "yes" (R. 93, 94). Hamm seated himself on a stool at the lunch counter and Reverend Ivory, a cripple, remained in his wheel chair at the counter (R. 15).

The Manager of the store, H. C. Whiteaker, saw Hamm occupy a seat at the lunch counter and sent for a police officer (R. 76). Two policemen arrived and in their presence the manager asked Hamm and Reverend Ivory to leave (R. 77). There is a conflict in the record as to whether or not the police officer requested the manager to ask the two to leave (R. 16, 26, 95). It is clear, however, that the manager asked them to leave because they were Negroes (R. 77, 78). Hamm and Ivory were peaceful and orderly at all times and there was no question of offensive conduct (R. 24, 79). The manager testified that it was the policy of the store not to serve Negroes at the counter (R. 72). However, he did not ask that the two Negroes be arrested (R. 29).

McCrory's is a nationwide chain store which has no national policy with regard to segregation (R. 72). The store in question is admittedly open to all people, including Negroes (R. 71, 74). Thus, Negroes are free to purchase items at any counter in the store other than the lunch counter.

Petitioner Hamm, along with Reverend Ivory, was tried and convicted of "trespass" in the Recorder's Court of the City of Rock Hill on June 29, 1960 and sentenced to pay a fine of one hundred dollars (\$100.00) or serve thirty (30) days in prison (R. 1, 116). On December 29, 1961 the convictions were affirmed by the York County Court, which noted the death of Reverend Ivory.

The Supreme Court of South Carolina affirmed the conviction of Hamm on December 6, 1962. Rehearing was denied on January 11, 1963.

How the Federal Questions Were Raised

At the commencement of the trial in the Recorder's Court of the City of Rock Hill, petitioner Hamm moved to require the City of Rock Hill to elect one statute under which to prosecute petitioner on the ground that prosecuting him under three separate statutes and all other "available" South Carolina law without an election violated the due process clause of the Fourteenth Amendment (R. 6). The motion was denied by the court (R. 13).

At the close of the prosecution's case petitioner Hamm moved for judgment of acquittal on the ground that the State of South Carolina by supporting a private policy of discrimination, violated the equal protection and due process clauses of the Fourteenth Amendment (R. 58, 59). The motion was overruled (R. 64). This issue was raised again and rejected at the conclusion of defendant's case by motion for a directed verdict (R. 98, 99); and after judgment, by motion for arrest of judgment or, in the alternative, for a new trial (R. 114).

On the appeal of petitioner Hamm and Reverend Ivory to the York County Court, the court stated that the offense of trespass had been stated with "reasonable and sufficient particularity." It stated that all other legal objections had been properly overruled and, relying on *City of Greenville v. Peterson*, 239 S. C. 298, 122 S. E. 2d 826, certiorari granted 370 U. S. 935 (No. 71, October Term, 1962), and *City of Charleston v. Mitchell*, 239 S. C. 376, 123 S. E. 2d 512, certiorari filed April 7, 1962 (No. 89, October Term, 1962), affirmed the conviction of Hamm. The court also noted the death of Reverend Ivory.

On appeal the Supreme Court of South Carolina rejected Hamm's contention that an election should have been required, stating that no prejudice had resulted to the

appellant. It also rejected Hamm's argument that his arrest and conviction by state officials violated the Fourteenth Amendment, stating that "identical contention was made, considered and rejected" in the cases of *City of Greenville v. Peterson*, 239 S. C. 298, 122 S. E. 2d 826, certiorari granted 370 U. S. 935 (No. 71, October Term, 1962); *City of Charleston v. Mitchell*, 239 S. C. 376, 123 S. E. 2d 512, certiorari filed April 7, 1962 (No. 89, October Term, 1962); *City of Columbia v. Barr*, 239 S. C. 395, 123 S. E. 2d 54, certiorari filed April 7, 1962 (No. 90, October Term, 1962); *City of Columbia v. Bouie*, 239 S. C. 570, 124 S. E. 2d 332, certiorari filed June 5, 1962 (No. 159, October Term, 1962).

Reasons for Granting the Writ

I

The State of South Carolina has enforced racial discrimination in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Petitioner seeks a writ of certiorari to the Supreme Court of South Carolina on the ground that his arrest and conviction constitute state enforcement of racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment. The South Carolina Supreme Court rejected this contention stating that "an identical contention was made, considered and rejected" in similar sit-in cases, *infra*, p. 10a.

State action enforcing racial discrimination and segregation is condemned by the equal protection clause of the Fourteenth Amendment. *Buchanan v. Warley*, 245 U. S. 60; *Brown v. Board of Education*, 347 U. S. 483; *Shelley*

v. *Kraemer*, 334 U. S. 1; *Gayle v. Browder*, 352 U. S. 903. Moreover, state supported racial discrimination which bears no rational relation to a permissible governmental purpose offends the concept of due process. *Bolling v. Sharpe*, 347 U. S. 497; *Cooper v. Aaron*, 358 U. S. 1.

Action by judicial officers is included within the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U. S. 1. Similarly, the amendment covers action by police officials. *Taylor v. Louisiana*, 370 U. S. 154; *Garner v. Louisiana*, 368 U. S. 157; *Monroe v. Papé*, 365 U. S. 167; *Screws v. United States*, 325 U. S. 91. See also *Baldwin v. Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman v. Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960); *Valle v. Stengel*, 176 F. 2d 697 (3d Cir. 1949).

Petitioner was arrested by a police officer of the City of Rock Hill (R. 28) even though the manager of the store did not request the arrest (R. 29). Indeed there is some testimony that the manager of the store was asked by the police to request petitioner to leave (R. 95). Even if the police did not initiate the request it is at least clear that they were enforcing a racially discriminatory policy of the store which was itself the reflection of community custom (R. 28). The manager testified, "I asked them to leave because we do not serve Negroes at the lunch counter" (R. 78). Such racial distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U. S. 81, 100. "For the state to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a state of the equal protection of the laws, in violation of the Fourteenth Amendment." *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 727 (dissenting opinion).

Any contention that preservation of the institution of private property requires the state to aid in the exclusion of Negroes in a situation such as this is ill-conceived. McCrory's is a national chain store with no national policy in regard to segregation (R. 72, 80). The manager testified that the store itself was open to all members of the general public including Negroes (R. 74). The lunch counter in question was an integral part of McCrory's operation.

The state involvement in the maintenance of segregation in McCrory's store is vividly brought out by reading the arrest warrant. There the City of Rock Hill emphasized that the lunch counter was "customarily operated upon a segregated basis," and that "racial tension was high due to numerous recent prior demonstrations against segregated lunch counters refusing service to members of the Negro race of the defendant, both within the city and throughout the south generally." It is clear from the warrant that state officials arrested Hamm not for any offensive conduct on his part, but simply because he was a Negro.

Factual and legal issues like those raised in this case are now before this Court in a number of cases, some of which have been argued, *Avent v. North Carolina*, 253 N. C. 580, 118 S. E. 2d 47, certiorari granted 370 U. S. 934 (1962) (No. 11, October Term, 1962); *Greenville v. Peterson*, 239 S. C. 298, 122 S. E. 2d 826, certiorari granted 370 U. S. 935 (No. 71, October Term, 1962), and some of which are pending decision on petition for writ of certiorari, *City of Charleston v. Mitchell*, 239 S. C. 376, 123 S. E. 2d 512 (No. 89, October Term, 1962); *City of Columbia v. Barr*, 239 S. C. 395, 123 S. E. 2d 54 (No. 90, October Term, 1962); *City of Columbia v. Bouie*, 239 S. C. 570, 124 S. E. 2d 332 (No. 159, October Term, 1962). The last four cases were relied on by the Supreme Court of South Carolina in rejecting the constitutional objections raised by petitioner in this case.

When questions presented in a petition for writ of certiorari are identical or similar to questions in another case in which the court has already granted certiorari, the issues involved in the petition are appropriate for review by certiorari. Compare *Trustees of Monroe Avenue Church of Christ v. Perkins*, 334 U. S. 813, with *Shelley v. Kraemer*, 334 U. S. 1.

Compare *Edwards v. South Carolina*, — U. S. —, 9 L. ed. 2d 697 and the disposition of *Fields v. South Carolina*; 31 U. S. L. Week 3297.

II

The City of Rock Hill was permitted to prosecute petitioner Hamm for violation of all the "available" South Carolina law including, but not limited to, three vague statutes with dissimilar provisions; he was sentenced and convicted for the general offense of "trespass" without ever being informed of which statute he had breached; all of which violated his rights under the due process clause of the Fourteenth Amendment.

Before the commencement of the trial in the Recorder's Court of the City of Rock Hill, petitioner Hamm asked the prosecutor to inform him under which statute the warrant had been drawn and on which statute the prosecution was relying for a conviction. The prosecutor declined to do so stating that the city "relies upon all the available law that has a proper bearing upon a relationship to the offense charged" (R. 6). The most he would reveal was that the city, "amongst other things," was relying on Section 16-386, Code of Laws of South Carolina, 1952, as amended 1954; Section 16-388 (2), Code of Laws of South Carolina, 1952, as amended 1960; and Section 19-12, Code of Laws of City of Rock Hill (R. 8). He mentioned those "without waiving

the right to rely upon any other sections" and he stated that Hamm could be found guilty of trespass "without reference necessarily to what particular statute or ordinances he is charged under" (R. 11, 12). The Recorder's Court supported the city in its refusal to be specific, stating, "The warrant informs the defendant of what he is charged . . ." (R. 13).

Thus the city was allowed to prosecute Hamm for the generic offense of trespass, bringing to bear the whole body of "available" (R. 6) or "applicable" (R. 11) South Carolina law including three specific statutes which, as will be shown below, covered conduct which was in some respects the same, in some respects different. Despite the fact that "good pleading would unmistakably inform the accused as to the law he is alleged to have violated . . ." *Corson v. U. S.*, 147 F. 2d 437, 438 (9th Cir. 1945), Hamm was forced to defend himself against an amorphous mass of South Carolina law.

This mass of law may have included South Carolina's vague crime of breach of peace. See *Edwards v. South Carolina*, — U. S. —, 9 L. ed. 2d 697, or even common law trespass, for the warrant alleged a general state of facts which could relate to any of the named statutes and which appeared to include other elements. As the warrant was phrased, it included not only elements of trespass, but also elements of breach of peace. When it referred to high racial tension, numerous anti-segregation demonstrations, and recent trials of demonstrators on charges of breach of peace, and when it implied that petitioner Hamm and his companion were helping to create this tension, it introduced elements which could only confuse Hamm in his defense. This confusion was compounded in the judge's charge to the jury. Here again it seemed that breach of peace was made an essential element of Hamm's crime.

The judge charged "trespass to property is a crime at common law when it is accompanied by or tends to create a breach of the peace. When a trespass is attended by circumstances constituting breach of the peace, it becomes a public offense, subject to criminal prosecution" (R. 103). Both from the warrant and the charge to the jury, petitioner Hamm was justified in believing that if the state could not prove that public disorder had been an element in this situation, it had not proved its case.

Without specific knowledge of the statute he was charged with violating, petitioner Hamm could not prepare an adequate defense for "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. New Jersey*, 306 U. S. 451, 453. Certainly it is basic to due process that a defendant should not be forced to guess what laws he is charged with violating.

Petitioner Hamm's rights were further denied because he was not informed of what statute he had been convicted. The jury simply found him guilty of the generalized offense of trespass (R. 112). The sentence of thirty days in jail or one hundred dollars fine could be imposed under Section 16-386, Section 16-388 (2), Section 19-12 of the City Code, or some other "applicable" statute. The statutes mentioned by the prosecutor prohibited dissimilar conduct. Hamm had no way of knowing how the prosecution met its burden of proving violation of a statute. Nor did he know whether he was convicted of violating an unconstitutional statute. This defect of not knowing the statute he allegedly breached was not cured by the fact that Section 16-388 (2) was one of the things read when the Recorder attempted to define trespass for the members of the jury (R. 102). Petitioner was neither found guilty of any particular statute or statutes nor was he acquitted of any others.

Petitioner's difficulties were enhanced because those statutes which were mentioned as outlawing his conduct, on their face, outlawed dissimilar conduct, so that trespass under the one might not be trespass under the other.

While Section 16-386, Code of Laws of South Carolina, 1952 and Section 19-12, Code of Laws of City of Rock Hill are similar, Section 16-388 (2), Code of Laws of South Carolina, 1952, as amended 1960, is substantially different. Section 16-386 and Section 19-12 prohibit entry on lands of another only "after notice from the owner or tenant prohibiting such entry." The notice can be given by posting notices on the borders of land. Section 16-386 on its face applied only to farm land and, at the time of the trial in this case it had never been construed as requiring a person who entered a business at the invitation of the owner to leave when asked.¹

Section 16-388 (2) on its face prohibits conduct completely unlike that prohibited by Section 16-386. It requires:

- (1) That a person enter a place of business.
- (2) That he be requested by the person in possession or his agent or representative to leave.
- (3) That he refuse to leave.
- (4) That he have no good cause or excuse for his refusal to leave.

Thus Section 16-386 and Section 19-12 on the one hand, and Section 16-388 (2) are different in at least four respects. First of all the conduct prohibited by Section 16-386 and Section 19-12 is entry after notice, not as in Section 16-388 (2) remaining after notice. Secondly, while

¹ *City of Charleston v. Mitchell*, 239 S. C. 376, 123 S. E. 2d 512, certiorari filed April 7, 1962 (No. 89, October Term, 1962), which expanded Section 16-386 to include conduct like that of this petitioner, had not yet been decided by the Supreme Court of South Carolina when this case was tried.

all three statutes make provision for actual notice, both Section 16-386 and Section 19-12 provide for constructive notice. Thirdly, when actual notice is given under Section 16-386 or Section 19-12 it must be given by the "owner or tenant," not by "the person in possession, or his agent or representative" as in Section 16-388 (2). Finally, there is no "good cause or excuse" requirement in Section 16-386 and Section 19-12 as there is in Section 16-388 (2). Hamm was therefore placed in the unfair position of defending against the whole body of "available" South Carolina law including specified statutes which prohibited dissimilar conduct.

In addition to being forced to defend himself without knowing under which statute or ordinance he was charged, the particular statutes and ordinances mentioned by the prosecutor as possibly providing a basis of conviction all contain vague and ambiguous provisions.

Both Section 16-386 and Section 19-12 of the Code of Laws of City of Rock Hill prohibit "entry" on another's land "after notice" from the owner or tenant. However, Negroes, including Hamm, were welcome to enter the store. Hamm was convicted only by expanding the words "entry after notice" to "remain after notice." But it is well settled that "judicial enlargement of a criminal act by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. U. S.*, 314 U. S. 306, 311.

Section 16-388 (2) is also unconstitutionally vague when applied in this situation. It states that a person must leave the premises when asked unless he has good cause or excuse not to leave. Nowhere in Section 16-388 (2) are the words "good cause or excuse" defined. No standards are set out

² See footnote 1.

by which Hamm and others similarly situated could know what amounts to "good cause or excuse." Certainly, in a store open to the public, including Negroes, where Hamm has purchased items and where he is orderly in every way, he should expect that he has "good cause or excuse" not to leave. In his instructions to the jury, the City Recorder stated that "good cause or excuse" meant "one valid in the eyes of the law, and under existing circumstances, not merely a personal cause or excuse of insufficient stature to have any legal force" (R. 104), but he refused to charge that race could not be the basis of a violation of the statutes (R. 105, 106). But if as a matter of law a Negro has no "good cause" to request service at a "whites only counter" the statute runs afoul of Mr. Justice Stewart's condemnation of legislative enactments "authorizing discriminatory classification based exclusively on color." *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 727 (concurring opinion). The vice in this section lies not only in the fact that the legislature has set no guidelines to determine the breach, but also in the fact that it has given such power to the manager of a store, permitting him to use the arbitrary classification of race as a basis for violation. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U. S. 385, 391.

In the case of *Thornhill v. Alabama*, 310 U. S. 88, a provision similar to this one was held to be too vague to

warrant a conviction of the accused. In that case a state statute said that any person who "without a just cause or legal excuse therefor" loitered about or picketed the place of business of another person could be imprisoned. The Court condemned the use of the words "without a just cause or legal excuse" saying that they did "not in any effective manner restrict the breadth of the regulation"; and that "the words themselves have no ascertainable meaning either inherent or historical" (310 U. S. at 100). Under this reasoning Section 16-388 (2) must also be held too vague to meet the requirements of fair notice.

Moreover, if it cannot be known from the record whether or not a defendant was convicted under an unconstitutionally vague statute, the conviction cannot stand because of the indeterminate possibility that it was premised on another provision of law not subject to the same infirmity. *Stromberg v. California*, 283 U. S. 359, 368. In *Stromberg* the court, noting that the defendant had been convicted under a general jury verdict which did not specify which of three statutory clauses it rested on, concluded that "if any of the clauses is invalid under the Federal Constitution, the conviction cannot be upheld." The principle was followed in *Williams v. North Carolina*, 317 U. S. 387, 392, when the court said:

"To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury would be to countenance a procedure which would cause a serious impairment of constitutional rights."

Certiorari should be granted for the additional reason that the City of Rock Hill, by burdening defendant with the whole body of "available" South Carolina law, by speci-

fying only statutes which were dissimilar and too vague to give Hamm notice that they prohibited his conduct, and by convicting him of the generalized offense of trespass without reference to a particular statute, violated Hamm's rights under the due process clause of the Fourteenth Amendment.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE YORK COUNTY COURT

CITY OF ROCK HILL,

—v.—

ARTHUR HAMM, JR.

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF ROCK HILL

Order

This Court now has before it for consideration a total of seventy-one cases which were heard by the Recorder's Court for the City of Rock Hill. The convictions of all defendants were in due time appealed to this Court and heard together by this Court on an agreed Transcript of Record. By occurrence and charge the cases are grouped as follows:

1. Sixty-five breach of peace charges, upon the public streets at City Hall, on March 13, 1960.
2. Three breach of peace charges, upon the public streets at Tollison-Neal Drug Store, on February 23, 1961.
3. One Trespass charge within McCrory's variety store, on April 1, 1960, before enactment of the 1960 Trespass Act (No. 743).
4. Two Trespass charges, within McCrory's variety store, on June 7, 1960, after enactment of the 1960 Trespass Act.

Order

An examination of the Transcript of Record on Appeal discloses no real distinction between the first sixty breach of peace cases at City Hall, the next five on the same day at the same place only a short time later, and the three breach of peace cases on the public streets at Tollison-Neal Drug Store. In all of these cases it appears from the record that the public peace was endangered, that the defendants were properly forewarned by a police officer to cease and desist from further demonstrations at that time and place, and move on, which they failed and refused to do, despite allowance of ample time within which to have complied with the order, and that thereafter they were arrested and charged with breach of peace as continuance of their activities under the circumstances then existing, as shown by the record, constituted open defiance of proper and reasonable orders of a police officer and tended with sufficient directness to breach the public peace.

The offense charged in each of the sixty-eight breach of peace cases is clearly made out under the facts shown by the Transcript of Record and the law of force in this state, particularly as the law is shown by the recent decision of the South Carolina Supreme Court in the case of *State v. Edwards et al.*, Opinion No. 17853, filed December 5, 1961.

In like manner this Court finds no distinguishing features between the one trespass case, which occurred at one time and place and the two later trespass cases at the same place. In all three cases each defendant was asked to leave the premises by the Manager of the store, this occurred in the presence of a city police officer, who then himself requested each defendant to leave and explained that arrest would follow upon failure to leave. After each defendant

Order.

failed to leave the private premises involved, following allowance of a reasonable opportunity after request so to do, first by the Manager and then by the police officer, each defendant was arrested and charged with trespass. Here again, under the facts disclosed in the record and the law of force in this state, the charge of trespass is properly made out as to each defendant. See *City of Greenville v. Peterson et al.*, S. C. Supreme Court Opinion No. 17845, filed November 10, 1961, and *City of Charleston v. Mitchell et al.*, S. C. Supreme Court Opinion No. 17856, filed December 13, 1961.

A number of specific legal questions were raised by the Defendants, including particularly a question as to adequacy and sufficiency of the warrants and whether or not the Defendants were properly advised of the charges pending against them. An examination of the warrants discloses that in each case the facts constituting the offense charged were stated with reasonable and sufficient particularity. It is the opinion of this Court that the various legal objections raised in the court below, which are not set forth in detail herein, were properly overruled. See *State v. Randolph et al.*, 239 S. C. 79, 121 S. E. (2d) 349, filed August 23, 1961, other authorities cited herein, and other applicable decisions of our Courts referred to in the cited authorities.

Accordingly, it is hereby *ordered and decreed* that the convictions by the Recorder's Court of the City of Rock Hill in all of the seventy-one cases under appeal are hereby affirmed, and each of the cases is remanded for execution of sentence as originally imposed.

This Court takes note, from published reports, of the untimely death of the Defendant, Rev. C. A. Ivory, since

Order

hearing of the appeals herein and before rendering judgment thereon.

All of which is duly ordered.

GEORGE T. GREGORY, JR.,
Residing Judge, Sixth Judicial Circuit.

Chester, S. C.,
December 29, 1961.

Opinion by Moss, A.J.THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CITY OF ROCK HILL,*Respondent,*

—v.—

ARTHUR HAMM, JR.,

Petitioner.

APPEAL FROM YORK COUNTY, GEORGE T. GREGORY, JR., JUDGE

Moss, A.J.:

Arthur Hamm, Jr., the appellant herein, was convicted in the Recorder's Court of the City of Rock Hill on June 29, 1960, of the charge of trespass, in violation of Section 16-388 (2) as is contained in the 1960 Cumulative Supplement to the 1952 Code of Laws of South Carolina. The judgment of conviction was affirmed on December 29, 1961, by the Honorable George T. Gregory, Jr., Resident Judge of the Sixth Circuit. This appeal followed.

The evidence shows that on June 7, 1960, the appellant, along with Rev. C. A. Ivory, now deceased, entered the premises of McCrory's Five and Ten Cent Store in the City of Rock Hill, South Carolina. Ivory was a cripple and confined to a wheelchair. He was pushed into the store by the appellant. Ivory and the appellant proceeded down the aisles of the store and made one or two purchases. Thereafter, they proceeded to the lunch counter, operated by

Opinion by Moss, A.J.

McCrory's. Ivory, still in his wheelchair, came to a stop between the stools at the said counter. The appellant took a seat on a stool at the lunch counter. The appellant and Ivory sought to be served. They were not served and were asked to leave the lunch counter. Upon their refusal to leave at the request of the manager of McCrory's store, they were placed under arrest by police officers of the City of Rock Hill.

The first question for determination is whether the City Recorder committed error in refusing to require the City of Rock Hill to elect whether the prosecution was under Section 16-386 or Section 16-388, Code of Laws of South Carolina, or Section 19-12, Code of Laws of the City of Rock Hill.

It should be borne in mind that the warrant charged the appellant with committing a trespass on June 7, 1960, and that he,

"did willfully and unlawfully trespass upon privately owned property by remaining along with one Rev. C. A. Ivory at the lunch counter in McCrory's variety store, which is customarily operated upon a segregated basis, and refusing to leave said counter, after the manager of said store, in the presence of City Police Capt. John M. Hunsucker, Jr., advised him he would not be served and specifically requested him to leave said lunch counter, and after the aforesaid police officer thereupon advised him that he would be arrested for trespass unless he left said premises as directed, which he nevertheless failed and refused to do, * * *."

The appellant asserts that under Section 15-902 of the 1952 Code of Laws of South Carolina that whenever a person is accused of committing an act which is susceptible of

Opinion by Moss, A.J.

being designated as several different offenses that the Municipal Court upon a trial of such person shall be required to elect which charge to prefer and a conviction of an offense upon such an elected charge shall be a complete bar to further prosecution for the alleged offense. An examination of the warrant here shows that the only offense charged against the appellant was that of a trespass and the warrant above quoted, in our opinion, charges a violation of Section 16-388 of the 1960 Cumulative Supplement to the Code, which provides that:

"Any person:

"(2) Who, having entered into the dwelling house, place of business or on the premises of another person • • • and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

"Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days."

The warrant under which the appellant was prosecuted plainly and substantially sets forth the acts of the appellant and thus informed him of the nature of the offense against him, in accordance with Section 43-111 of the 1952 Code. *City of Charleston v. Mitchell, et al.*, 239 S. C. 376, 123 S. E. (2d) 512, and *City of Greenville v. Peterson, et al.*, 239 S. C. 298, 122 S. E. (2d) 826.

This case was tried by the Recorder of the Municipal Court of Rock Hill, with a jury. The Recorder, in delivering his charge to the jury, gave the following instructions:

Opinion by Moss, A.J.

"Now, this defendant is charged under a warrant issued by the city of Rock Hill with the offense of trespass. I am not going to read this warrant to you. It has been read to you and it has been discussed, and you know what is in the warrant. If you want to know then what is meant by trespass, what does trespass mean, I am going to read to you a portion of an Act of the General Assembly which became law on the 16th day of May, 1960, reading you only a portion of it, and that portion which applies in this particular case.

"Any person who, having entered into a place of business or on the premises of another person, firm, or corporation, and fails and refuses without good cause or good excuse to leave immediately upon being ordered or requested to do so by the person in possession, or his agents or representatives, shall on conviction be fined not more than \$100.00 or be imprisoned for not more than thirty days."

It is readily apparent that the Recorder submitted to the jury only the question of whether the appellant was guilty of the offense of trespass as is defined by an Act of the General Assembly, approved May 16, 1960, 51 Stats. 1729, now incorporated in the 1960 Supplement to the Code as Section 16-388 (2).

Should the City Recorder have required an election by naming the statute under which the prosecution was brought? We think not. The warrant here charged a single offense of trespass upon facts which are not in dispute. In 27 Am. Jur., indictments and informations, Section 133, at page 691, we find the following:

" * * * There need, of course, be no election where the indictment or information charges only one offense

Opinion by Moss, A.J.

and the several different counts are merely variations or modifications of the same charge. This rule has been applied to an indictment where an unlawful act relied on by the state as the basis for the charge was made unlawful by more than one statute, it being held that in such case it is error to compel the state to elect upon which statute it relies for a conviction. * * * ."
State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220.

In 42 C.J.S., Indictments and Informations, Section 185, at page 1149, we find the following:

"* * * No election is necessary where the indictment, properly construed, charges but one offense although several acts comprising the offense are included, or several methods by which the offense may have been committed are stated. The prosecuting attorney is not required to state at the trial the particular section of the code under which accused is being tried where the offenses or acts with which accused is charged are fully set out, nor is he required to elect where the offenses defined by the various statutes are included within the crime charged, * * * ."

And again:

"* * * Although no express statement of election is made by the prosecution, accused is not prejudiced where the trial in fact proceeds on only one charge, or appropriate instructions are given to the jury. * * * ."

There is nothing substantial in the objection that the City Recorder refused to require the city of Rock Hill to elect the particular statute upon which the prosecution was based. The warrant charged a single offense of trespass

Opinion by Moss, A.J.

and the Recorder submitted to the jury only the question of whether the appellant was guilty of trespass as such was defined in the statute heretofore cited. There was no prejudice to the appellant.

The record shows that the appellant and the Rev. C. A. Ivory are Negroes. It was the policy of McCrory's store not to serve Negroes at its lunch counter. The appellant asserts by exceptions 3, 4 and 5 that his arrest by the police officers of the city of Rock Hill and his conviction of trespass that followed was in furtherance of an unlawful policy of racial discrimination and constituted State action in violation of his rights to due process and equal protection of the laws under the Fourteenth Amendment to the United State Constitution. Identical contention was made, considered and rejected in the cases of *City of Greenville v. Peterson, et al.*, 239 S. C. 298, 122 S. E. (2d) 826; *City of Charleston v. Mitchell, et al.*, 239 S. C. 376, 123 S. E. (2d) 512; *City of Columbia v. Barr, et al.*, 239 S. C. 395, 123 S. E. (2d) 521; and *City of Columbia v. Bouie, et al.*, 239 S. C. 570, 124 S. E. (2d) 332, in each of which was involved a sit-down demonstration similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was McCrory's in the case at bar.

All exceptions of the appellant are overruled and the judgment appealed from is affirmed.

Affirmed.

TAYLOR, C.J., LEWIS and BRAILSFORD, J.J., concur. BUSSEY, A.J. did not participate.

**Petition for Rehearing and Petition for
Stay of Remittur**

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Case No. 4912

CITY OF ROCK HILL,

Respondent,

—v.—

ARTHUR HAMM, JR.,

Appellant.

Supreme Court of South Carolina

Clerk's Office, Columbia, S. C.

Filed December 17, 1963

Frances H. Smith, Clerk

Petition denied.

Supreme Court of South Carolina

Clerk's Office, Columbia, S. C.

Filed January 11, 1963

Frances H. Smith, Clerk

C. A. TAYLOR, C.J.

JOSEPH R. MOSS, A.J.

J. WOODROW LEWIS, A.J.

J. M. BRAILSFORD, A.J.

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1009

2

ARTHUR HAMM, JR., PETITIONER,

versus

CITY OF ROCK HILL, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 1009

ARTHUR HAMM, JR., PETITIONER,

versus

CITY OF ROCK HILL, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

QUESTIONS PRESENTED

1. Was there any evidence of State action denying equal protection under the Fourteenth Amendment, which would invalidate petitioner's conviction of trespass laws relating to private business establishments?
2. Was there any denial of due process to petitioner under the Fourteenth Amendment by failing to require the prosecution, at the trial's outset, to elect as to the particular statute relied upon, where the court later, before submitting the case to the jury, restricted the charge to one designated statutory offense?

STATEMENT

Petitioner, a Negro, along with one Reverend C. A. Ivory, also a Negro, now deceased, entered a ten cent store in Rock Hill, South Carolina, on June 7, 1960. Ivory, a crippled person, was pushed in a wheel chair by petitioner. They made a purchase or two and then proceeded to the lunch counter, where petitioner seated himself. Service of food was sought, which was refused. They were then asked to leave by the store manager, and they refused to do so. Petitioner testified (R. 95) that the police requested the manager to ask him to leave. The police (R. 16, R. 26) testified that the manager asked him to leave on two occasions, and then the police asked him to leave before arresting him. The manager (R. 77 and R. 78) was explicit in his testimony that he was the first one to ask petitioner to leave. Petitioner was tried and convicted in Recorder's Court of trespass and sentenced to pay a fine of \$100.00 or serve thirty days. The conviction was affirmed by the Court of General Sessions on December 29, 1961, and by the Supreme Court of South Carolina on December 6, 1962. Rehearing was denied January 11, 1963. The decision of the Supreme Court of South Carolina is reported at 128 S. E. (2d) 907.

ARGUMENT

1. Was there any evidence of State action, denying equal protection under the Fourteenth Amendment, which would invalidate petitioner's conviction of trespass laws relating to private business establishments?

The City of Rock Hill has no ordinance requiring the segregation of the races in eating establishments. Consequently, the ruling of this Court in *Peterson v. City of Greenville*, May 20, 1963, that the enactment of such an ordinance is State action proscribed by the Fourteenth Amendment is not applicable here.

Neither is there any evidence of an official command or authoritative executive declaration such as was held to be State action in *Lombard v. State of Louisiana*, decided by this Court on May 20, 1963. On the contrary, it was brought out by petitioner's attorney (R. 72) from petitioner's own witness that there was no memorandum from the Police Department of the City of Rock Hill concerning racial segregation in eating establishments.

It is respectfully submitted that such racial discrimination as is shown here resulted from private action not prohibited by the Fourteenth Amendment. There is no manifestation of any prohibited State action.

2. Was there any denial of due process to petitioner under the Fourteenth Amendment by failing to require the prosecution, at the trial's outset, to elect as to the particular statute relied upon, where the Court later, before submitting the case to the jury, restricted the charge to one designated statutory offense?

Respondent respectfully submits that petitioner here argues only a question of a State court's determination of a procedural question. No attempt was made on appeal to the Supreme Court of South Carolina to argue a due process violation under the Fourteenth Amendment; consequently, it is unavailable to petitioner here. Rule 8, Section 2, of the Supreme Court of South Carolina provides as follows:

"Section 2. The Brief of Appellant shall be preceded by a statement of the questions involved.

"This statement of the questions involved must be set out in the briefest and most general terms. It should never exceed one page, unless the questions involved absolutely require it, and must always be printed on the first page of the Brief, without any other matter appearing thereon. Ordinarily, no point will be considered which is not set forth in the statement of the

ARTHUR HAMM, JR., PETITIONER, v.

questions involved or suggested thereby." (Emphasis added.)

The question of due process not having been raised in the Supreme Court of South Carolina, or actually decided whether raised or not, the argument thereon cannot be considered by the Supreme Court of the United States. *Beck v. Washington*, 369 U. S. 541, 8 L. Ed. (2d) 98, 82 S. Ct. 955.

It is respectfully submitted that this due process question has not been properly raised, has not been decided by the Supreme Court of South Carolina, and cannot now be argued for the first time in the Supreme Court of the United States.

CONCLUSION.

It is respectfully submitted, for the foregoing reasons, that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964

— No. 2 —

ARTHUR HAMM, JR.,

Petitioner,

—v.—

CITY OF ROCK HILL.

— No. 5 —

FRANK JAMES LUPPER, et al.,

Petitioners,

—v.—

ARKANSAS.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND THE SUPREME COURT OF THE STATE OF ARKANSAS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No. 2

ARTHUR HAMM, JR.,

Petitioner,

—v.—

CITY OF ROCK HILL.

No. 5

FRANK JAMES LUPPER, *et al.*,

Petitioners,

—v.—

ARKANSAS.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA AND THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR PETITIONERS

Opinions Below

1. *Hamm v. Rock Hill.* The opinion of the Supreme Court of South Carolina (R. Hamm 101) is reported at 241 S. C. 446, 128 S. E. 2d 907 (December 6, 1962). The order of the Sixth Judicial Circuit Court of York County, December 29, 1961, is unreported (R. Hamm 96). The oral sentence

ing of the defendant in the Rock Hill Recorder's Court, June 29, 1960, is unreported (R. Hamm 96).

2. *Lupper v. Arkansas*. The opinion of the Supreme Court of Arkansas (R. Lupper 76) is reported at — Ark. —, 367 S. W. 2d 750 (May 13, 1963). The supplemental opinion denying rehearing of the Supreme Court of Arkansas (R. Lupper 89) is reported at — Ark. —, 367 S. W. 2d 760 (June 3, 1963). The Pulaski County Circuit Court delivered no opinion (R. Lupper 75). The jury fixed the sentences (R. Lupper 74).

Jurisdiction

1. *Hamm v. Rock Hill*. The final judgment of the Supreme Court of South Carolina, which is the order denying rehearing, was entered on January 11, 1963 (R. Hamm 106). The petition for certiorari was filed April 10, 1963, and granted June 22, 1964 (R. Hamm 108).

2. *Lupper v. Arkansas*. The final judgment of the Supreme Court of Arkansas, which is the order denying rehearing, was entered June 3, 1963 (R. Lupper 89). The petition for certiorari was filed September 3, 1963, and granted June 22, 1964 (R. Lupper 91).

The jurisdiction of this Court in each of these cases is invoked pursuant to 28 U. S. Code §1257(3), petitioners having asserted below and here the denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Does the Federal Civil Rights Act of 1964 compel the reversal of these convictions, as a matter of federal law?
2. Must these cases be remanded to the state courts, for consideration there of the effect of the Federal Civil Rights Act?
3. Do these convictions result in the enforcement of racial discrimination against petitioners, with such admixture of "state action" as to bring to bear the guarantees of the Fourteenth Amendment?
4. Can these convictions stand against due process vagueness objections, in view of the fact that the conduct shown in the record does not fall within the language of the statutes applied?
5. Did the refusal of the trial judge to require the prosecutor in the *Hamm* case to specify the law under which the defendant was charged, the consequent indefinite form of the jury instructions, and the varying statutory grounds on which Hamm's conviction was affirmed by the state appellate courts, deprive petitioner of due process of law?

Constitutional Provisions, Statutes and Ordinance Involved

1. This case involves the following provisions of the Constitution of the United States:
Article 1, Section 8, Clause 3;
Article VI, paragraph 2;
The Fourteenth Amendment.

2. This case also involves the following statutes of the United States:

Civil Rights Act of 1964, Title II, 78 Stat. 243-246, set forth, *infra*, at p. 1a;

1 U. S. C. §109, 61 Stat. 635:

¶ *Repeal of statutes as affecting existing liabilities.*—The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

3. This case also involves the following South Carolina Statutes and Ordinance of the City of Rock Hill:

Section 16-386, Code of Laws of South Carolina, 1952, as amended 1954:

Entry on another's pasture or other lands after notice; posting notice

Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner of tenant prohibiting such entry; shall be a misdemeanor and be punished by a fine not to exceed

one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960:

Any person:

- (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or
- (2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative, shall on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

Section 19-12, Code of Laws of the City of Rock Hill:

Entry on lands of another after notice prohibiting the same

Every entry upon the lands of another, after notice from the owner or tenant prohibiting the same, shall be a misdemeanor. Whenever any owner or tenant of any lands shall post a notice in four conspicuous places

on the border of any land prohibiting entry thereon, and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county where such lands situate, a proof of the posting and publishing of such notice within twelve months prior to the entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for hunting and fishing.

4. This case also involves the following Arkansas Statutes:

Arkansas Statutes §41-1433 (Act 14 of 1959):

Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00), or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment.

Arkansas Statutes, §1-103 (1947):

Repeal of criminal or penal statute—Effect on Offenses Committed.—When any criminal or penal statute shall be repealed, all offenses committed or forfeitures accrued under it while it was in force shall be punished or enforced as if it were in force, and notwithstanding such repeal, unless otherwise expressly provided in the repealing statute. [Act Dec. 21, 1846, §1, p. 93; C. & M. Dig., §9758; Pope's Dig., 13283.]

Arkansas Statutes, §1-104 (1947):

Existing actions not affected by repeal.—No action, plea, prosecution or proceeding, civil or criminal, pend-

ing at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed, (except that all proceedings had after the taking effect of the revised statutes, shall be conducted according to the provisions of such statutes, and shall be in all respects, subject to the provisions thereof, so far as they are applicable). [Rev. Stat., ch. 129, §31; C. & M. Dig., §9759; Pope's Dig., §13284.]

Statement

1. *Hamm v. City of Rock Hill*

Petitioner Hamm, a Negro college student, and Reverend C. A. Ivory, a Negro minister, were arrested for a sit-in demonstration at the lunch counter of McCrory's variety store in Rock Hill, South Carolina on June 7, 1960. They were convicted of "trespass" and sentenced to pay a fine of \$100 or spend 30 days in jail (R. Hamm 1, 2). Rev. Ivory died during the appeal of the convictions (R. Hamm 98).

On June 7, 1960 Hamm and Rev. Ivory entered McCrory's Dime Store (R. Hamm 67, 68), a retail national chain store, open to the public at large (R. Hamm 59, 60, 61, 66, 68). After purchasing several items in the store, they decided to order coffee at the lunch counter (R. Hamm 69, 70, 76). The lunch counter is one of 20 counters in the store and is separated from the adjoining counter solely by an aisle (R. Hamm 58). Hamm seated himself on a stool, and Rev. Ivory, a cripple, remained in his wheelchair next to the counter (R. Hamm 12, 13, 28). Although Hamm and Rev. Ivory were orderly and neatly dressed (R. Hamm 20, 64, 65, 71, 72) the manager of the store,

H. C. Whiteaker, told them that "he could not serve them" (R. Hamm 63). Mr. Whiteaker, under questioning by defendant's counsel, clearly specified that the store's policy was that of not serving Negroes seated at the lunch counter (R. 59-64):

Q. Now, I believe, is it true that you invite members of the public to come into your store? A. Yes, it is for the public.

Q. The policy of your store as manager is not to exclude anybody from coming in and buying these three thousand items on account of race, nationality or religion, is that right? A. The only place where there has been exception, where there is an exception, is at our lunch counter.

Q. I see. Now, sir, if I may ask you, what is the basis of this policy as to the lunch counter; first, I want to know as to race, religion and nationality. What is the basis of it? A. Since I have been here, which is, the restaurant has been open nine years, we have not served a Negro seated at the lunch counter (R. Hamm 59).

Negroes were welcome in all other parts of the store and could buy food to "take out" at the end of the counter (R. Hamm 60, 61). This policy of segregation at lunch counters in places of public accommodation was in conformity with the custom of the community (R. Hamm 23, 61).

Q. Oh, I see, but generally speaking, you consider the American Negro as part of the general public, is that right, just generally speaking? A. Yes, sir.

Q. You don't have any objections for him spending any amount of money he wants to on these 3,000 items

do you? A. That's up to him to spend if he wants to spend.

Q. This is a custom, as I understand it, this is a custom instead of a law that causes you not to want him to ask for service at the lunch counter? A. There is no law to my knowledge, it is merely a custom in this community (R. Hamm 61).

After the arrival of two police officers, the manager asked Hamm and Rev. Ivory to leave the lunch counter (R. Hamm 64). It is not clear whether the manager made the request with or without the prompting of the police officers (R. Hamm 71, 77). Rev. Ivory insisted upon a refund for the purchases that he had made in other parts of the store. The testimony is conflicting as to whether Rev. Ivory refused to leave or whether he merely insisted upon a refund before leaving and was arrested before the manager indicated the place for refund (R. Hamm 14, 15, 22, 29, 30, 31, 32, 71, 79).

Rev. Ivory was tried for trespass in the Recorders Court in the City of Rock Hill on June 29, 1960. The prosecuting attorney relied on three state and city "trespass" statutes, S.C. Code §16-386, S.C. Code §16-388 (2), Code City of Rock Hill §19-12, and "any other sections" (R. Hamm 7). Petitioner Hamm's case was submitted to the jury on the Ivory record (R. Hamm 1). Defendants filed timely motions raising Fourteenth Amendment due process and equal protection objections during and after the trial (R. Hamm 34-53, 80-81). The jury returned a general verdict of guilty and defendants were sentenced to pay a fine of \$100 or serve 30 days in prison. On December 29, 1961 the convictions were affirmed along with several breach of the peace convictions and other trespass convictions in the Sixth Judicial Circuit Court of York County. The Court

did not specify which statute applied to the *Hamm* case, but did not distinguish the trespass charge in *Hamm's* case from a trespass charge in a case arising before enactment of the 1960 trespass law S.C. Code §16-388 (2). On December 6, 1962, the Supreme Court of South Carolina affirmed the conviction of Hamm (R. Hamm 101) on the basis of S.C. Code §16-388 (2) (1960 trespass law). That Court concluded:

There is nothing substantial in the objection that the City Recorder refused to require the City of Rock Hill to elect the particular statute upon which the prosecution was based. The warrant charged a single offense of trespass and the Recorder submitted to the jury only the question of whether the appellant was guilty of trespass as such was defined in the statute heretofore cited. There was no prejudice to the appellant.

The record shows that the appellant and the Rev. C. A. Ivory are Negroes. It was the policy of McCrory's store not to serve Negroes at its lunch counter. The appellant asserts by exceptions 3, 4 and 5 that his arrest by the police officers of the City of Rock Hill and his conviction of trespass that followed was in furtherance of an unlawful policy of racial discrimination and constituted State action in violation of his rights to due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Identical contention was made, considered and rejected in the cases of City of Greenville v. Peterson, et al., 239 S.C. 298, 122 S. E. 2d 826; City of Charleston v. Mitchell, et al., 239 S.C. 376, 123 S. E. (2d) 512; City of Columbia v. Barr et al., 239 S.C. 395, 123 S. E. (2d) 521, and City of Columbia v. Bouie, et al., 239 S.C. 570, 124 S. E. 2d 332, in each of which

was involved a sit-down demonstration similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was McCrory's in the case at bar (R. Hamm 105).

Rehearing was denied on January 11, 1963 (R. Hamm 106).

2. *Lupper et al. v. Arkansas*

Petitioners Frank James Lupper^a and Thomas Robinson were arrested and convicted of trespass for participation in a "sit-in" demonstration in the luncheon area of the Blass Department Store in Little Rock, Arkansas.

On the afternoon of April 13, 1960, police officer Baer followed a group of Negroes, including petitioner Thomas Robinson, when he saw them entering the Blass Department Store (R. Lupper 36, 38). When he observed their seating themselves in the mezzanine luncheon area he left the store and reported his observations to police headquarters (R. Lupper 37). Two other police officers were sent by headquarters to join officer Baer (R. Lupper 37). When the three officers were across the street from the store they were approached by two store managers, whom they accompanied back to the store upon being told that "they had some colored boys" (R. Lupper 26, 27). The petitioners were found on the main floor of the department store (R. Lupper 32, 33). The managers pointed them out to the police as two of a group of five or more Negroes who had sought service in the luncheon area and failed to

^a The opinion of the Supreme Court of Arkansas uses the name "James Frank Lupper." The brief herein uses the name Frank James Lupper as that is petitioner's true name (R. Lupper 53).

leave after being refused service (R. Lupper 32, 33, 42, 46).^b The officers testified they arrested petitioners after petitioners admitted they had refused to leave the luncheon area upon the manager's request (R. Lupper 29). None of the officers had seen the petitioners refuse to leave the luncheon area, and as one stated, the arrests had been made solely because the managers had asked to "get them out from the lunch counter" (R. Lupper 29, 35, 38).

The store was open to the general public^c and the luncheon area was operating at the hour petitioners were seeking service (R. Lupper 47). One manager noted that it was his "busiest time" and he "expected a good many people" (R. Lupper 47). Negroes who sought service in the luncheon area, however, were told by the manager, "we are not prepared to serve you at this time and will you kindly excuse yourself" (R. Lupper 42). No objection was made to the demeanor of appellants as the managers testified that they were not loud, boisterous or disrespectful at any time and were "neatly dressed" (R. Lupper 42, 48).^d

The petitioners, two Negro students at a local college, were regularly served in areas of the department store other than the luncheon area, petitioner Lupper testifying that his mother held a charge account with the store for some 19 to 20 years (R. Lupper 54, 59, 61, 62). Petitioners indicated that as they were regular customers in the store they thought they should be served in the luncheon area also (R. Lupper 54, 57, 62, 64).

^b Petitioner Robinson claimed he had not been told to leave, for after arriving in the mezzanine he had turned and left when he saw the other Negro youths leaving (R. Lupper 61, 64-65).

^c In addition to trespass, petitioners were charged under the breach of the peace statute which covers only a "public place of business." Section 41-1432, Arkansas Statutes (Section 1 of Act 226 of 1959).

^d This fact dictated reversal of petitioners' convictions of breach of the peace by the Supreme Court of Arkansas (R. Lupper 79, 81).

Petitioners were charged with breach of the peace in violation of Section 41-1432, Arkansas Statutes (Section 1 of Act 226 of 1959) and with refusal to leave a business establishment after request in violation of Section 41-1433, Arkansas Statutes (Section 1 of Act 14 of 1959).

They were tried on April 21, 1960 in the Municipal Court of Little Rock and convicted on both charges (R. Lupper 1, 2). Thereupon they appealed to the Pulaski County Circuit Court, where trial was had before a jury on June 17, 1960. Each was again convicted on both charges and each received a fine of \$500.00 and 6 months' imprisonment on the Act 226 violation and a fine of \$500.00 and 30 days' imprisonment on the Act 14 violation (R. Lupper 74).

Thereafter, the petitioners took an appeal to the Supreme Court of Arkansas. This appeal was consolidated for briefing with *Briggs v. State* (No. 4992) and *Smith v. State* (No. 4994) (R. Lupper 77). On May 13, 1963, the Supreme Court of Arkansas handed down its decision, reversing all the Act 226 convictions for lack of evidence and affirming the Act 14 convictions of the petitioners, holding:

It is contended that the Act is so vague as to make it impossible to determine what conduct might transgress the statute. It is said that the Act provides no ascertainable standard of criminality. With these contentions we cannot agree. The Act clearly, specifically and definitely makes the failure to leave the business premises of another upon request of the owner or manager a misdemeanor (R. Lupper 81).

Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the Fourteenth Amendment to the Federal Constitution. . . .

There is no right in these defendants under either State or Federal law to compel the owners of lunch counters to serve them. Many states have enacted so-called "public accommodation" statutes but Arkansas is not among them. The Fourteenth Amendment does not guarantee any such right to the appellants (R. Lupper 84).

* * * * *

The petitioners sought rehearing (R. Lupper 88-89) which was denied (R. Lupper 89-90) on June 3, 1963.

Summary of Argument

I

The Civil Rights Act of 1964, Title II (Public Accommodations), compels the reversal of these cases and their remand for dismissal, both under the doctrine expounded in *Bell v. Maryland*, — U. S. —, 12 L. Ed. 2d 822, and by virtue of §203(e) of the Civil Rights Act, forbidding "punishment" of acts such as those here shown to have been committed. By an action "possibly unique" in national legislative history, *Bell v. Maryland, supra*, at 829, Congress has declared it to be in the national interest that acts such as those here sought to be punished be permitted, has outlawed the interest vindicated by these prosecutions, and has expressly forbidden the punishment of persons acting as petitioners have acted. The federal and common-law doctrine of abatement of criminal prosecution, on removal of the taint of criminality, here applies, and the federal "saving statute" (1 U. S. C. §109) does not shield these prosecutions from the effect of that doctrine, for, as a matter both of its own construction and the effect on it of §203(e) of the Civil Rights Act, the "saving" statute has no application here.

Though the Court need never reach the point, it is, moreover, entirely clear, under the holding in *Bell v. Maryland, supra*, that these cases, if it were not that they must be reversed as a matter of federal law, must be remanded to the state courts for consideration there of the abating effect of the Civil Rights Act, for that Act, besides being paramount national law, is a part of the law of every state, and the position, in each state, is therefore the same as the position in Maryland as shown in *Bell*.

In the South Carolina case, the absence, in that state, of any "saving" statute, and the state's consistent adherence to the common-law rule of abatement on a legislative abolition of the crime, would make remand unnecessary, even under the erroneous assumption that state law alone applied, since South Carolina could not refuse to abate these prosecutions, in the face of the Civil Rights Act, without effecting a forbidden discrimination against a federal law.

II

These records exhibit the use of state power to effect racial discrimination, contrary to the equal protection clause of the Fourteenth Amendment.

South Carolina and Arkansas, as a matter of well-known history, have lent state power to the support of the custom of segregation. Neither state has taken any turn in regard to this question; both, for example, still retain on their statute-books extensive Jim Crow codes. The custom thus supported and given moral sanction by law is in turn expressed in the actions taken by proprietors in these cases. The causal chain is clear and visible; it is impossible that no causal connection exists between the power of the state that supports the custom of segregation, and the act of the proprietor who follows the custom. At the least, the state itself, in a criminal prosecution, cannot be heard to deny

that its own efforts to preserve segregation as a custom have been efficacious.

Further, under the doctrine of *Shelley v. Kraemer*, 334 U. S. 1, "state action" is found in the use of the state police, prosecutorial, and judicial powers, to implement and give sanction to racial discrimination in the extended public life of the community, even though the pattern of discrimination is nominally "private" in origin. No suggested distinction of *Shelley* is successful, and that case must either be overruled, openly or *sub silentio*, or applied here.

Thirdly, the states concerned have acted, insofar as "action" is necessary to the "denial" of "equal protection," by maintaining legal regimes in which, in final effect, a narrow and technical "property" claim is given preference to the claim of Negroes to be protected against the insult and inconvenience of public segregation.

None of these theories of "state action," broad though they are, need bring the Fourteenth Amendment into the authentically private life of man, for there are many reasonable canons of interpretation, applicable to the substantive guarantees of the Fourteenth Amendment, which may be invoked if cases *arise* calling for their invocation. In the cases at bar, no true private associational interest exists and the Court need not and ought not, in these cases, be concerned with the exact location of any lines which might later have to be drawn. It is enough to note that sound and equitable considerations exist on the basis of which such lines may be drawn when needful, so that the Court need not, in taking note of the plain "state action" here shown, fear a commitment to the intrusion of the Fourteenth Amendment into matters genuinely private.

III

These convictions violate due process of law, in that the statutes alleged to be violated do not forbid the conduct shown on the record, so that the convictions either (1) are without any evidence of the crime charged, or (2) are under a statute failing entirely to warn.

The statutes concerned in these cases very clearly make criminal a refusal to leave the "premises" or "place of business," *after an order to leave the "premises" or "place of business."* Both records show affirmatively, on the state's own testimony, that no such order was given; the order, in each case, was an order to move away from one part of the "premises" or "place of business." Criminal trespass statutes do not cover the whole field of civil trespass; they are special and narrow in their application. The action of disobeying an order to leave a man's house is a very different action from that of disobeying an order to move away from his piano, in a context of general welcome elsewhere in the house; the statute criminally penalizing the first cannot automatically be extended to cover the second. A statute prescribing a long jail term for refusal to leave the "place of business" or being ordered to leave the "place of business," cannot, without a violation of due process, be made the basis of conviction for refusing to stand back from the lunch counter.

In the *Hamm* case, the defendant was denied due process of law by the refusal of the prosecutor and trial judge to specify the law under which he was charged, by the consequent vagueness of the law set forth in the instructions to the jury, and by the variance between the law charged the jury and the law on the basis of which the state appellate courts sustained defendant's conviction.

ARGUMENT

I.

The Enactment of the Civil Rights Act of 1964, Subsequent to These Convictions But While They Were Still Under Direct Review, Makes Necessary Either Their Outright Reversal or a Remand to the State Courts for Consideration of That Act.

A. *The Civil Rights Act of 1964 Abates These Prosecutions as a Matter of Federal Law, and These Cases Should Be Reversed on That Ground.*

On July 2, 1964, the federal Civil Rights Act of 1964, 78 Stat. 241, went into effect, providing, *inter alia*:

TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION.

Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

* * *

(2) any restaurant, cafeteria, lunchroom, *lunch counter*, soda fountain, or other facility principally engaged in selling food for consumption on the premises, *including, but not limited to, any such facility*

located on the premises of any retail establishment; or any gasoline station; . . .

• • •

(4) Any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), *it serves or offers to serve interstate travelers or a substantial portion of the food which it serves*, or gasoline or other products which it sells, *has moved in commerce*; . . . and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. . . .

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured

by section 201 or 202; or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) *punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.* [Emphasis added.]

It is clear that department store lunch counters, such as those involved in these cases, fall within the terms of §201(c)(2), as quoted.¹ The discrimination practiced in these cases was, on the records, racial (R. Hamm 72-3 *et passim*. R. Lupper 27, 35, 36, 46, 50-51). Had these al-

¹ The retail store lunch counters involved in these cases are literally covered by the Act, for, being open to the general public (R. Hamm 59-61, 66, 68; R. Lupper 47, 79), they "offer to serve interstate travelers . . ." §201 (b)(2), (c)(2). This statutory language contains no requirement of "substantiality," if that term could have any meaning in this context. The Bill, as originally introduced in the House by Congressman Celler as H.R. 7152, did contain such a limiting requirement in Sec. 202 (a)(3):

... (i) the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers . . . *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 1, at 653 (1963).

This section of the act was changed to its present broader form after passing through the full House Judiciary Committee. *Minority Report*, H.R. Rep. No. 914, 88th Cong., 1st Sess. 79 (1963). The omission of a requirement of "substantiality" cannot have been inadvertent, for there stands in immediate contiguity the criterion, in the alternative, that a "substantial portion" of the food served has moved in interstate commerce. "Offering to serve" interstate travelers, as an *alternative* ground to actually serving them, could hardly contain a "substantiality" requirement. It is virtually impossible that an establishment which makes a principal or massive appeal to interstate travelers would never serve one. Yet, if some "substantiality" requirement be read into the "offer to serve" criterion, that establishment would be the only one brought within the Act independently by the "offer to serve" test. Congress, in adding this language and eliminating the "substan-

leged offenses occurred after its passage, therefore, the Civil Rights Act would furnish a complete defense, not only because it is unthinkable that a state should be permitted to punish disobedience to an order the giving of

tiality" requirement, can hardly have meant to designate a class that would be as good as empty.

This literal interpretation harmonizes completely with other portions of the coverage section, for Congress obviously intended to include virtually all hotels, gas stations, and places of amusement, especially motion picture houses. Congressman Celler's remarks, in presenting the bill, state an intent to do, for the nation as a whole, exactly what was done before in the 30 states having public accommodation laws 110 Cong. Rec. 1456 (daily ed. Jan. 31, 1964). He also spoke of the coverage of retail store lunch counters in terms indicating that their simply being "public" was enough. *Id.* p. 1457.

This construction is eminently reasonable. It is the aggregate rather than the individual effect of the prohibited practice that counts. *Wickard v. Filburn*, 317 U. S. 111, 127, 128; *NLRB v. Fainblatt*, 306 U. S. 601, 606, 607; *United States v. Darby*, 312 U. S. 100, 123; and it cannot be doubted that, if every restaurant not principally or largely catering to interstate travelers were segregated, the aggregate effect of the segregation of these thousands of restaurants would substantially inconvenience interstate travel. The Negro interstate traveler would still be a second-class interstate traveler, who could be confident of service only if he kept blinders on and never left the principal routes of travel to see the sights, to shop between trains, or to make any other of the departures travelers customarily make from the shortest way.

What Congress seems to have done is to cover every lunch counter that brings itself within the constitutional power of Congress by virtue of its making any kind of an offer to serve a public that includes interstate travelers, while leaving it open that some genuinely eccentric case may present itself and be found outside of the Act (cf. the "intrastate colored" lavatories that briefly flourished a few years ago in railroad stations). *NLRB v. Fainblatt*, *supra*, at p. 607. That this is the right construction of the phrase in question is conclusively shown by the fact that the provision would be virtually impossible to administer without it; a requirement that every Negro desiring a meal face an argument about (and finally the necessity of making an elaborate record on) the degree and quality of an offer to serve interstate travelers, would as good as nullify the Act. Particularly is this true of the use of the Act as a defense in criminal prosecutions, a use whose contemplation by Congress is proved with rare clarity by the legislative history. See text, *infra*, pp. 22, 23.

which contravenes a federal right, but because such punishment is itself explicitly declared unlawful, in §203 (c), *supra*. Senator Humphrey, floor manager for the bill in the Senate, read into the record a Justice Department statement containing this language:

It need hardly be added, however, that nothing in section 205 (b) [now §207 (b), making the "remedies" of the Act exclusive] precludes a defendant in a State criminal trespass prosecution arising from a "sit in" at a covered establishment from asserting the non-discrimination requirements of title II as a defense to the criminal charge. The reference in section 205 (b) to "means of enforcing" the right created by title II obviously does not deal at all with the question of whether the right created by that title may be used as a defense in criminal proceedings. Raising a defense in a criminal case is not "enforcing" a right, by a "remedy" within the meaning of section 205 (b). That section is intended to preclude only direct affirmative action by the Government, or by a person aggrieved acting as a plaintiff, pursuant to Federal laws other than the provisions contained in title II. It is not intended and should not be read as precluding a plea in a criminal prosecution, or an action for damages, against a person availing himself of the Federal right created by title II, that the criminal or civil action against him is not well taken. That this is the proper connotation of the title is made doubly clear by section 203 (c) which prohibits the imposition of punishment upon any person "for exercising or attempting to exercise any right or privilege" secured by section 201 or 202. This plainly means that a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that State

courts must entertain defenses grounded upon these provisions. . . . 110 Cong. Rec. 9162-3 (daily ed. May 1, 1964).

In effect, the "offense" with which petitioners are charged is now removed, by the paramount federal authority, from the category of punishable crimes—exactly the thing that happened with respect to the Maryland "offense," when that state passed the public accommodations law that was the basis of the action taken by this Court in *Bell v. Maryland*, — U. S. —, 12 L. Ed. 2d 822, except that the Civil Rights Act is stronger, since it contains that §203 (e) quoted in the preceding statement proffered by Senator Humphrey, and directly forbidding "punishment" for an attempt at exercising the named rights.

If these petitioners are now to be punished notwithstanding §203 (e), it will be for having insisted upon something which the national conscience has now most decidedly declared they are entitled to insist upon, against a refusal which the national conscience has now declared affirmatively unlawful. Their punishment can serve no purpose, for no valid state or private interest can now be admitted to exist in deterring them or others from doing what they have done; the only licit deterrence interest now runs the other way. Their punishment would afford the immoral spectacle of pointless revenge against those whose claim, substantially, has been validated by national authority. Such a result ought to be allowed only if the law unequivocally commands it. It is petitioners' submission that the law actually forbids it—that the Civil Rights Act of 1964 and especially its §203 (e), placed in the setting of the ancient law expounded in this Court's opinion in *Bell v. Maryland, supra*, abates these prosecutions and forces their remand for dismissal.

Not only the text but all the implications and radiations of the Civil Rights Act are a part of federal law, overriding contradictory state law to their full extent. *Gibbons v. Ogden*, 22 U. S. (9 Wheaton) 1; *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U. S. 173; *Sperry v. Florida*, 373 U. S. 379. In the *Sola* case, this Court said, at p. 176:

It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co. v. United States*, 313 U. S. 289, 296; *Prudence Corp. v. Geist*, 316 U. S. 89, 95; *Board of Comm's v. United States*, 308 U. S. 343, 349-50; cf. *O'Brien v. Western Union Telegraph Co.*, 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awolin v. Atlas Exchange Bank*, 295 U. S. 209; *Deitrick v. Greaney*, 309 U. S. 190, 200-01.

This Court, in fitting the statute into the complex web of federal-state relations, must follow the method set out

in *San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36 v. Garmon*, 359 U. S. 236, 239, 240:

The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the size and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process.

(Cf. *Van Breeck v. Sabine Towing Co.*, 300 U. S. 342, 351.) The classic doctrines of the two preceding quotations are exactly applicable to the question of the abative effect of the Civil Rights Act of 1964 on these prosecutions.

Apart from statute, the general federal rule is that a change in the law, prospectively rendering that conduct innocent which was formerly criminal, abates prosecution on charges of having violated the no longer existent law. See *Bell v. Maryland*, *supra*, 12 L. Ed. 2d at p. 826, n. 2; *United States v. Chambers*, 291 U. S. 217; *United States v. Tynen*, 78 U. S. (11 Wall.) 88.

Though the case has apparently never arisen, there would seem to be no reason for the non-application of this rule

to the operation of a federal statute upon state prosecutions, where the federal statute has the effect (as the Civil Rights Act of 1964 has with respect to these prosecutions) of rendering lawful, in the name of the national authority and interest, that which formerly was unlawful, and rendering unlawful the actions and claims of the person whose interests are protected by the state's prosecution, cf. *Bell v. Maryland*, — U. S. at —, 12 L. Ed. 2d at 825. Indeed, the case is *a fortiori*, for the national authority is supreme.

Unless, therefore, there is statutory warrant for the contrary conclusion, the effect of the Civil Rights Act of 1964, in its Sections 201 ff., must be to abate these prosecutions.

The only relevant statutory provision is the first sentence of the Act of February 25, 1871, R.S. 13, now codified in 1 U. S. C. §109, in the following terms:

§109. Repeal of statutes as affecting existing liabilities.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Both as a matter of its own construction and because of the existence of §203(c) of the Civil Rights Act, this statute does not apply here. To it, first, may be directed, with even stronger force, the remarks of this Court on the similar Maryland statute, in *Bell v. Maryland, supra*, 12 L. Ed. 2d at pp. 828, 829:

By its terms the clause does not appear to be applicable at all to the present situation. It applies only to the "repeal," "repeal and re-enactment," "revision," "amendment," or "consolidation" of any statute or part thereof. The effect wrought upon the criminal trespass statute by the supervening public accommodations laws would seem to be properly described by none of these terms. The only two that could even arguably apply are "repeal" and "amendment." But neither the city nor the state public accommodations enactment gives the slightest indication that the legislature considered itself to be "repealing" or "amending" the trespass law. Neither enactment refers in any way to the trespass law, as is characteristically done when a prior statute is being repealed or amended. This fact alone raises a substantial possibility that the saving clause would be held inapplicable, for the clause might be narrowly construed—especially since it is in derogation of the common law and since this is a criminal case—as requiring that a "repeal" or "amendment" be designated as such in the supervening statute itself.

The absence of such terms from the public accommodations laws becomes more significant when it is recognized that the effect of these enactments upon the trespass statute was quite different from that of an "amendment" or even a "repeal" in the usual sense. These enactments do not—in the manner of an ordinary "repeal," even one that is substantive rather than only formal or technical—merely erase the criminal liability

that had formerly attached to persons who entered or crossed over the premises of a restaurant after being notified not to because of their race; they go further and confer upon such persons an affirmative right to carry on such conduct, making it unlawful for the restaurant owner or proprietor to notify them to leave because of their race. Such a substitution of a right for a crime, and vice versa, is a possibly unique phenomenon in legislation; it thus might well be construed as falling outside the routine categories of "amendment" and "repeal."

Of the two words here discussed, "amend" and "repeal," "amend" is the more nearly apt to describe the effect of the Civil Rights Act on the trespass laws of the states, though neither exactly answers; see *Bell v. Maryland*, *supra*, 12 L. Ed. 2d at pp. 828, 829. But the federal "saving clause," by its own terms, saves rights under the prior statute only when "repeal" has taken place. While some lower federal courts have held "amendment" tantamount to "repeal," in applying this statute, e.g. *United States v. Taylor*, 123 F. Supp. 920 (S. D. N. Y. 1954), this Court has never so held. On the other hand, the literal force of "repeal," was insisted on, in another context, in *Moore v. United States*, 85 Fed. 465 (8th Cir. 1898). The word "repeal" cannot, in any case, be stretched to cover the total reversal of law and policy which The Civil Rights Act has effected on the permissible applications of generally valid state trespass statutes. What has happened is not "repeal" but the affirmative utterance of an overriding national judgment, practical and moral, removing all taint from actions such as petitioners', and declaring it to be a national wrong to deny them service or to "punish" them for seeking service. This is a "possibly unique phenomenon in [federal] legislation;" see *Bell v. Maryland*, *supra*, 12 L. Ed. 2d at p. 829.

It is further, certain that the word "statute," three times used in the here relevant first sentence of 1 U. S. C. §109, to denote the prior law that is "saved," does not refer to state enactments at all. This section now stands, and since its enactment in 1871 always has stood, in a context dealing entirely with federal enactments.² There exists, moreover, a sound policy reason for this limitation; it is one Congress might sensibly have wished to make. For where criminal liabilities are saved, the federal prosecutor, an officer responsible ultimately to national authority, can use his discretion to prevent a harsh application. If state criminal liabilities were saved, in the face of a national determination that the acts on which they rest ought not to be criminal, no such tempering of the rule, by any official responsible to the nation as a whole, would be possible. National executive clemency would likewise be foreclosed.

An entirely independent and most compelling reason exists for denying 1 U. S. C. §109 any application to the

² The 1871 legislative history of the act from which 1 U. S. C. §109 descends is wholly silent on this provision, except for a single recitation of its content, without exegesis or comment. See Million, *Expiration or Repeal of a Federal or Oregon Statute as a Bar to Prosecution for Violations Thereunder*, 24 Ore. L. Rev. 25, 31, 32 (1944). But the context of the discussion makes it plain that only federal statutes were in Congress' mind. The enactment was part of an Act "Prescribing the form of the enacting and resolving clauses of the acts and resolutions of Congress, and rules for the construction thereof." The other sections of the Act, three in number, deal with form of enacting clauses, routine rules of construction, and non-revival of repealed statutes by repeal of the repealing Act. (Now 1 U. S. C. §§1 (in part), 101-104, and 108.) The discussion touched on these sections, rather than on the one here of interest. Cong. Globe, 41st Cong., 2d Sess. 2464 (1870); *Id.*, 3rd Sess. 775 (1871). The Forty-First Congress, with Mr. Conkling's voice so strong in this and other debates, was not one to which it is reasonable to attribute a latent tenderness to states' rights. On the whole record of these debates, it is entirely plain that the application of the saving provision to state law was never thought of, and that the whole focus of interest was the internal characteristics of Acts of Congress, and their mutual relations.

present cases. That statute itself provides that the "penalty" shall be "extinguished" if the repealing act "so expressly provide. . . ." The Civil Rights Act of 1964, in its Section 203, as seen above, forbids not only the withholding of service at places of public accommodation, not only the intimidation and coercion of persons seeking such service, but also [§203(e)] *punishing or attempting to punish* "any person for exercising or attempting to exercise any right or privilege *secured* by section 201 or 202." [Emphasis added.] The present prosecutions would clearly fall under this law, if the acts on which they are based had taken place after July 2, 1964. They fall under the law, anyway, if the word "secure" be taken in one of its normal dictionary meanings (soundly rooted in its etymology and exemplified in the last words of the Preamble to the Constitution of the United States), "to put beyond the hazard of losing or of not receiving." *Webster's New International Dictionary*, 2d. ed., s.v. "secure"; "To render safe, protect or shelter from, guard *against* some particular danger . . . To make secure or certain . . ." *New English Dictionary*, s.v. "secure." "Secure" is not an apt synonym for "create," a synonym necessary for referring §203(e) solely to the period after July 2, 1964. It is an apt word for "making safe that which already or independently exists," and that interpretation results in the literal applicability of §203(e) to these prosecutions.

The House Committee Report on the Civil Rights Act, H. R. Report No. 914, 88th Cong., 1st Sess. (1963), contains passages that corroborate the judgment that Congress, in considering the public accommodations title of the bill, was thinking not only in terms of "rights" to be *created* by it, but of "rights" already existent, at the very least on the moral plane, which were to be "*secured*" by it. The Report at p. 18 says, for example, that:

Today, more than 100 years after their formal emancipation, Nègroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

In the next paragraph, it is added:

A number of provisions of the Constitution of the United States clearly supply the means to "secure these rights," and H. R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.

That this language refers, among other things, to the public accommodations problem is made clear on the same page, where it is said of the bill:

It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public . . .

This application is also suggested by specific statement in the part of the Report at p. 20 dealing with public accommodations:

Section 201 (a) *declares* the basic right to equal access to places of public accommodation, as defined, without discrimination or segregation on the ground of race, color, religion, or national origin. [Emphasis added.]

In the Senate, a textual change, highly significant here, took place when, in §207(b), the phrase "based on this title" was substituted for "hereby created," in application

to the rights to public accommodation. Senator Miller of Iowa, explaining, said:

One can get into a jurisprudential argument as to whether the title creates rights. *Many believe that the title does not, but that the rights are created by the Constitution.* [Emphasis added.] 110 Cong. Rec. 12999 (daily ed. June 11, 1964).

These passages make it plain that the Act was passed in an atmosphere in which the "right" to non-discrimination was conceived of, at least in part, as something that existed before the bill, something that was recognized, declared, and protected, rather than being created, by the bill. It is not necessary, and would probably be impossible, to ascertain just how, in every context, this conception of "right" functioned with other conceptions, or how it may finally be fitted into the Act in all its parts. It suffices to show, and the quoted passages do show, that there is nothing unnatural in a construction of §203(c) to apply to the punishment or attempted punishment of the claim of the right to be free from discrimination, the same right "secured" and specially implemented by the law, but conceived of as existing, at least morally, prior to its passage. On this view, §203(c) is tantamount to a specific shield against the force of 1 U. S. C. §109, even if that section would have applied in the absence of §203(c).

It is entirely plain that at least some of the "rights" "secured" by Title II of the Civil Rights Act were necessarily conceived as preexisting the Act, as a matter of strictest law, for Title II proscribes discrimination supported by "state action" [§201(a) and (b)]. It is not controversial that such discrimination was unlawful before the Act. Moreover, among the forms of "state action" said by the Act to infect discrimination with illegality is state

"enforcement" of "custom" (§201(d)(2))—terminology seemingly applicable to the very cases at bar (see Points IIA and IIB, *infra*, pp. 46-57). In §203(e), Congress lumps together all these "rights" without the slightest suggestion of there being intended any distinction between them, with respect to the present lawfulness of "punishing" their assertion, whenever that assertion took place. It can hardly be believed that Congress would have wished to present this Court with the task of unravelling and disentangling those "rights" which did and those which in some strict sense did not antedate the Act, merely for the purpose of disposing of residual prosecutions for actions now approved. It is much more reasonable to think that Congress meant to forbid "punishment" of all actions descriptively similar to those now shielded by the Act.

In addition to the assistance of the federal common law, we are aided in the construction of §203(e) and 1 U. S. C. §109 by the framework of federal constitutional law. The Fourteenth Amendment guarantees of equal protection of the laws and due process of law forbid the infliction of penalties on a discriminatory basis. The action taken by Congress under the fifth section of that Amendment in enacting the Civil Rights Act of 1964 places petitioners in a different juxtaposition to the States today than at the time that these cases were affirmed in the Supreme Courts of the states. At that time, consideration of the prohibitions of the Fourteenth Amendment involved petitioners' claim to freedom from state police and judicial enforcement of racial discrimination as a counterpoise to the restaurateurs' claim to the use of the States' police and judicial machinery in the protection of his private property. Today, there is nothing left to balance against the first of these claims. The claims and interests of the restaurateur to racially discriminate in the use of his private property can no longer receive the protection of law; moreover, conduct

by the restaurateur in furtherance of such claims is condemned by law.

Affirmance of these convictions and the subsequent punishment of these petitioners would stand alone as a last vestige of state activity in furtherance of racial discrimination. No longer can the state be heard to say that petitioners' release could be grounded only on a non-existent right to service at lunch counters; that right exists. No longer can the state insist that release of petitioners is an abandonment of the rule of law to the rule of self-help; the rule of law today forbids the restaurateur self-help in furtherance of racial discrimination. Finally, the state today cannot maintain that the release of petitioners abandons the right of the restaurateur to use his property in a discriminatory way: the restaurateur does not have that right.

Also, the power of Congress over interstate commerce, and the functioning of this Court in judging upon burdens placed on that commerce by the states, are hereby complexly involved. In part, the establishments covered by the act are defined at those "affecting commerce." *Serving or offering to serve interstate travelers* is one of the defining criteria, §201(e)(2). Congress' decision to put this law into effect must therefore have rested, in part, on the judgment that racial discrimination, in establishments offering to serve interstate travelers, constituted an undesirable burden on that commerce. But if that be the fact found by Congress, it must have been found by Congress to be the fact as well before as after the passage of the bill. Congress could not have passed this section without having made the judgment that the very practices which were here lent the extreme sanction of the criminal law were deleterious to the national interest, even before the Act was passed. It is not necessary to urge that this consideration

alone would justify this Court in striking down these convictions as transgressing the implications of the Commerce Clause, though the aid of a judgment by Congress on such a question is most considerable. Rather, the questions of construction are illuminated. To deny 1 U. S. C. §109 an unnatural and unanticipated application here only results in allowing this practical judgment by Congress to be fully effective as to the times respecting which it was actually made. To interpret §203(c) as petitioners urge produces the same result.

These considerations are necessarily technical, since they concern the construction of words. But they are not harmfully technical in view of the context in which they arise. The result of their rejection would be that many people suffer terms of imprisonment for peaceably claiming rights which Congress has now, overwhelmingly, in one of the great legislative enactments of our history, declared it to be in the national interest to "secure" against invasion.

The objective of avoiding this anomaly would be not a worthy ground for reversing these convictions, were the legal underpinning unsound. It is submitted that it is sound. In the absence of statute, the effect of an Act of Congress, making innocent that which was a crime, is to abate prosecution and shield against punishment. It would be incompatible with the Supremacy Clause to attribute any less effect than that to a federal Act which wipes out the criminality of an action made criminal by one of the states, for a federal law functions in a dual capacity, as a supreme law of the nation and as a part of the law of every state. *Hauenstein v. Lynham*, 100 U. S. 483. The only statute in question, 1 U. S. C. §109, can be construed to prevent this salutary effect only by stretching the word "repeal" to cover something quite outside the customary meaning of that term, and only by taking the word "statute," in a context dealing with federal enactments only, to

refer to the laws of the state. If either of these constructions is wrong—and it is submitted both are wrong—then 1 U. S. C. §109 has no application. If §203(c) of the Act be interpreted to mean all it seems to mean, then 1 U. S. C. §109, by its own affirmative terms, does not apply and, indeed, could not apply against a later Act of Congress. On any of these three grounds, no statutory bar prevents the application of the settled non-statutory rule, and these prosecutions must be abated, in accordance with that rule. As this Court said in *Bell v. Maryland*, — U. S. at —, 12 L. Ed. 2d at 829:

The legislative policy embodied in the supervening enactments here would appear to be much more strongly opposed to that embodied in the old enactment than is usually true in the case of an "amendment" or "repeal." It would consequently seem unlikely that the legislature intended the saving clause to apply in this situation, where the result of its application would be the conviction and punishment of persons whose "crime" has been not only erased from the statute books but officially vindicated by the new enactments. A legislature that passes a public accommodations law making it unlawful to deny services on account of race probably did not desire that persons should still be prosecuted and punished for the "crime" of seeking service from a place of public accommodations which denies it on account of race. Since the language of the saving clause raises no barrier to a ruling in accordance with these policy considerations, we should hesitate long indeed before concluding that the Maryland Court of Appeals would definitely hold the saving clause applicable to save these convictions.

This Court should hesitate even longer before concluding, within the area of its own responsibility that, where

the language of the federal saving clause raises no barrier, where its key words "repeal" and "statute" must be lavishly extended to apply, where the non-statutory rule is clear, where the new statute explicitly forbids "punishment," and where the policy considerations are national in scope and prime in national importance, these petitioners may now be jailed for having done what Congress has, after dramatic struggle and overwhelming national decision, said that it is in the national interest they be allowed to do.

This application of the Civil Rights Act is not "retroactive"; this is clearly shown by the reference above to §203(c), with its prohibition of "punishment". It is the *punishment* of these petitioners, in the future, that would be interdicted, not on the ground (so far as the present Point is concerned) that their acts were lawful when performed, or even that their convictions were unlawful when had, but on the well settled ground that punishment is inappropriate, and violates the present conscience of the relevant political society, when the legislative authority that has the power to do so declares that the taint of criminality ought to be removed from acts previously infected with it. It would not be out of place to quote the South Carolina court's powerful statement of the reasons for this rule:

The reason of the law is obvious; it is not only unwise and impolitic, but it is unjust to punish a man for the commission of an act which the law no longer considers as an offence. The policy of a country may require the prohibition of certain acts, or the performance of certain duties for a time, after which the acts may be innocent, and the duties not required. It would not be less absurd to punish a man for an act which is not illegal at the time the punishment is inflicted, than to punish him for one which never has been declared illegal; and upon an examination of the authori-

ties relied on by the counsel for the appellant, it will be found, that they are all embraced within this doctrine. *State v. Cole*, 2 McCord 1, 2, 3 (S. C. 1822).

The nature of the statutes concerned here makes these cases fit the reason of the rule with a singular aptness. The petitioners, if freed by operation of this rule, would be the beneficiaries of no subtle gap in the seisin of the law, no merely technical "repeal" by dubious implication, no lapse or expiration through inadvertence. What they did would not have been criminal at all, in the states concerned, before 1959 or 1960, or could be made so only by a construction of prior state law so bizarre as to violate due process. *Barr v. Columbia*, — U. S. —, 12 L. Ed. 2d 766. In 1959 and 1960 respectively, Arkansas and South Carolina made this conduct criminal (waiving for present purposes the problems of construction and application in the amending statutes of these years, see Point III, *infra*). Then Congress, the legislative authority with power to do it, squarely and in the amplest equity made these acts non-criminal, made their punishment unlawful, and made unlawful the very request to leave on disobedience to which the prosecutions were based. The conscience of the United States, by overwhelming consensus in both Houses of Congress, and by the approval of the President, has said that it is wrong and against the national interest for acts such as these to be punished. There never was a clearer case for the application of the common-law principle of abatement on change in the law; there never was a less appealing case for the stretched construction of a "saving" statute. If the convictions as well as the Civil Rights Act had been federal, and if 1 U. S. C. §109 had been applied, it is extremely unlikely that prosecutor's discretion or executive clemency would have left people to suffer who had been convicted of "offenses" now virtually declared by

Congress to be meritorious, certainly blameless. As matters stand, neither federal prosecutor's discretion nor federal executive clemency can help these petitioners. But they can be helped by the application of the settled rule adverted to in *Bell v. Maryland, supra*, 12 L. Ed. 2d at p. 826, and by a natural construction of §203(c). .

No vested private rights or even expectations make inappropriate the application to petitioners' cases of the common-law rule. This is therefore, in relevant respects, a stronger case than *Louisville and Nashville R.R. Co. v. Mottley*, 211 U. S. 149. In that case, a contract between the railroad and the Mottleys had created a vested contract right, perfect under state law, and arising out of operative facts long antedating any federal statutory expression of policy such as to make obnoxious to a federal interest the enforcement of the contract. Yet this Court held that the enforcement of the contract violated federal law, and revised a state court judgment ordering specific performance.

A striking parallel is found in the dealings of the Courts of Appeals of the Second and Ninth Circuits with the problem of pseudo-retroactivity, in cases under the Wagner Act. The employer has been held guilty of an unfair labor practice when he refused to reinstate employees whom he had discharged during a strike prior to the effective date of the Act. *Phelps Dodge v. NLRB*, 113 F. 2d 202 (2d Cir. 1940), *modified and remanded on other grounds*, 313 U. S. 177 (1941); *NLRB v. Carlisle Lumber*, 94 F. 2d 138 (9th Cir. 1937), cert. den. 304 U. S. 575 (1938), cert. den. 306 U. S. 646 (1939). In effect, these courts held that punishment, for activities before the Act in time but favored and fostered by the Act, was forbidden, though the language of the Wagner Act was less literally applicable than the "punishment" language of §203(c) of the Civil Rights Act. Employers were forbidden to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in

Section 7 . . . " and " . . . by discrimination in regard to hire and tenure . . . to encourage or discourage membership in any labor organization. National Labor Relations Act (Wagner-Connery Act) §8(a)(1) and (a)(3), 49 Stat. 452 (1935), 29 U. S. C. §158(a)(1) and (a)(3). If the policy of the Wagner-Connery Act, without a specific ban on "punishment," could reach far enough to force the resumption of a terminated relationship, on the ground that, though the termination was lawful when accomplished, non-reinstatement countervailed the Act, surely it is unallowable that imprisonment be suffered now for activities Congress has so decisively approved. As these Wagner-Connery cases show, this result could be attained without the specific "punishment" language of §203(e), but that language hammers the point home clearly, and also makes clear the applicability of this principle to the states, the entities as to which the concept of "punishment" is most relevant. Cf. *United States v. California*, 297 U. S. 175.

There is no legitimate state interest, of a public nature, in punishing these petitioners, now that the Civil Rights Act is in force. The deterrence of petitioners, and others, from insisting on service, as against the wishes of the proprietors to practice racial discrimination, is now an illegitimate object, directly contravening federal law and policy. There is no legitimate private interest left, to be indirectly protected, for the federal law now explicitly forbids the selection of clientele on a racial basis.

Finally, petitioners remind the Court that the views here urged have not to do with a constitutional rule, binding on Congress in the future. To these cases as to the case of *Bell v. Maryland* may be applied, with the substitution of the words "unlawful act" for "crime", the words of the Court in that case: "Such a substitution of a right for a crime, and vice versa, is a possibly unique phenomenon in

legislation . . . " — U. S. at pp. —, 12 L. Ed. 2d at pp. 828, 829. But if Congress anticipates its recurrence, and desires to prevent the effect of abatement of state prosecutions where its own authority has made non-criminal the conduct on which they rest, this can freely be done, either by a special saving clause in a particular statute, or by an amendment to the general saving clause, 1 U. S. C. §109. It is not for this Court now to fill this gap by a very strict construction of the Civil Rights Act and a very large and liberal construction of an 1871 general saving clause statute that was clearly passed with no such problem as this in mind, and with no view to adjusting the relations between state and federal law. Without such construction, the Civil Rights Act, under the common-law rule, abates these prosecutions and they ought to be remanded for dismissal.

These cases might, it is true, be remanded to the state courts for consideration even of the federal question here raised. But petitioners submit that such an action would be one of only specious comity. The question argued in the foregoing point is one of uniform national importance; very many pending cases, in a number of states and at various stages of procedure, hang on its resolution. The truly helpful action to the states would be a clearcut determination at this time by the court to which the question will ultimately have to come.

B. *The Least Possible Consequence in These Cases, of the Rule Announced in Bell v. Maryland Is Their Remand to the State Courts, for Consideration There of the Effect of the Enactment of the Federal Civil Rights Act of 1964.*

In *Bell v. Maryland*, — U. S. —, 12 L. Ed. 2d 822, decided at the last term of this Court, it was held that the enactment of a state public accommodations law, subsequent to the commission of the alleged offenses but while

the convictions were still under review, made appropriate a remand to the state courts, for consideration of the question whether, within the framework of the state common and statutory law, such intervening enactment destroyed the legal basis for prosecution and made dismissal appropriate. This action was taken by this Court after careful consideration both of the general common law rule and of the Maryland general "saving clause," 1 Md. Code §3 (1957), see *Bell v. Maryland, supra*, 12 L. Ed. 2d at pp. 826-828, 831, 832.

The federal Civil Rights Act besides being a permanent federal law, is a part of the law of each state.

It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See, also *Shanks v. Dupont*, 3 Pet., 242; *Foster v. Neilson*, 2 Pet., 253; *Cherokee Tobacco*, 11 Wall., 616; Mr. Pinkney's Speech, 3 Elliot's ~~Constit.~~ Deb. 231; *People v. Gerke*, 5 Cal., 381. (*Hauenstein v. Lynham*, 100 U. S. 483, 490.)

For the narrower application of the *Bell* holding the position, therefore, must be taken to be the same as it would be if Arkansas and South Carolina had, while these prosecutions were pending, enacted laws exactly equivalent, in tenor and effect, to the federal Civil Rights Act.

Arkansas has a general "saving clause" statute, Ark. Stats., 1947, §1-103:

1-103. Repeal of criminal or penal statute—Effect on Offenses Committed.—When any criminal or penal statute shall be repealed, all offenses committed or for-

feitures accrued under it while it was in force shall be punished or enforced as if it were in force, and notwithstanding such repeal, unless otherwise expressly provided in the repealing statute. [Act Dec. 21, 1846, §1, p. 93; C. & M. Dig., §9758; Pope's Dig., §13283.]

The application of this statute to the saving of these prosecutions is even more dubious than that of the Maryland statute, *Maryland v. Bell*, *supra*, for the Arkansas statute speaks only of "repeal", where the Maryland statute speaks of "amendment" as well, see *Bell v. Maryland*, *supra*, — U. S. at p. —, 12 L. Ed. 2d 822 at pp. 828-9 (quoted *supra* herein at pp. 27, 28), and the operation of a public accommodations statute, forbidding racial discrimination, upon a general trespass law, more nearly resembles "amendment" than "repeal," though (as the Court points out in *Bell*) neither word may be apt.

The same remarks apply to Ark. Stats., §1-104:

1-104. Existing actions not affected by repeal.—No action, plea, prosecution or proceeding, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed. (except that all proceedings had after the taking effect of the revised statutes, shall be conducted according to the provisions of such statutes, and shall be in all respects, subject to the provisions thereof, so far as they are applicable). [Rev. Stat., ch. 129, §31; C. & M. Dig., §9759; Pope's Dig., §13284.]

South Carolina has no general "saving clause," and applies the common-law rule, *State v. Moore*, 128 S. C. 192, 122 S. E. 672 (1924); see Point I-C, *infra* for fuller discussion of the position in that state.

* As to both these states, and as to both these pending Civil Rights' Act is to be taken to be solely a state-law cases, therefore (even on the assumption, which is contrary to fact, see Point I-A *supra*, that the abating effect of the question), the least effect of *Bell* must be reversal and remand for consideration of the question whether the Civil Rights' Act, in its section quoted above, has the effect of abating these prosecutions.

C. *In the Case of Hamm v. City of Rock Hill, This Court Might Finally Reverse, on the Ground That, Since South Carolina Has No "Savine" Statute and Follows the Common Law Rule, Any Determination by the Courts of That State That This Prosecution Is Not Abated Would Be So Out of Line With Its Prior Law as to Constitute a Discrimination Against a Federally Originated Right.*

South Carolina, as pointed out above, differs from most American states in that it has no statute modifying the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a criminal proceeding charging such conduct." *Bell v. Maryland*, *supra*, U. S. at p. —, 12 L. Ed. 2d at 826.

Obedient to this principle, South Carolina has never, so far as can be discovered, sustained criminal punishment of an act no longer criminal when the punishment was to be inflicted. This principle has been applied not only to cases of total "repeal" but also to cases of modification of the nature and elements of criminality. *State v. Moore*, 128 S. C. 492, 122 S. E. 672 (1924), was a case of prosecution for giving a check without funds to cover, under a statute in which fraud was not an element. An intervening statut-

* For the South Carolina court's early and powerful statement of this rule, see the note on page 17, 48.

added the requirement of fraud, and the conviction was reversed.

No South Carolina case has been found that could cast doubt on the proposition that as a matter of the standing law of that state, the passage by its legislature, on July 2, 1964, of a law in the same terms as the federal Civil Rights Act, must result in the reversal of these convictions and the dismissal of the cases. Clearly, South Carolina must give just that effect to the federal Act. *Hauenstein v. Lynham*, 100 U. S. 483. Her failure to do so would, it is submitted, violate her obligation to apply her law as it stands to matters concerning federal right, see *Testa v. Katt*, 330 U. S. 386; *Wright v. Georgia*, 373 U. S. 284, 291; *Bouie v. Columbia*, — U. S. —, 12 L. Ed. 2d 894, 901.

It is submitted, therefore, that the remand of the South Carolina cases for consideration of the effect of the Civil Rights Act would be a uselessly delaying procedure, and that (even on the assumption that the abative effect of that Act is one of state law) this Court ought now finally to reverse the *Hamm* conviction.

II.

Petitioners' Convictions Enforced Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

A. The States of Arkansas and South Carolina Are Involved in the Acts of Racial Discrimination Sanctioned in These Cases Because Such Acts Were Performed in Obedience to Widespread Custom, Which in Turn Has Received Massive and Long-Continued Support From State Law and Policy.

Petitioners submit that this argument goes to the very heart of the known historic and present truth about the connection between the segregation pattern, clearly exemplified in these cases,⁴ and the public power of the Southern states. With the deepest respect, petitioners are content to adopt the language of the dissenting opinion in *Bell v. Maryland*, — U. S. —, —, 12 L. Ed. 2d 822, 860:

This contention rests on a long narrative of historical events, both before and since the Civil War, to show that in Maryland, and indeed in the whole South, state laws and state actions have been a part of a pattern of racial segregation in the conduct of business, social, religious, and other activities. *This pattern of segregation hardly needs historical reference to prove it.* [Emphasis added.]

To the familiar history referred to in the emphasized sentence, it need only be added that (unlike Maryland, see *Bell v. Maryland*, *supra*, 12 L. Ed. 2d at p. 860, n. 21 (dissenting opinion)) neither Arkansas nor South Carolina has shown the slightest tendency to attempt to break the

⁴ See pp. 8-12, *supra*.

iron chain of causation that links the past with the present. As late as 1959, the officially stated objective of the governor of Arkansas was the "continuation of segregated schools." Inaugural Address, 4 Race Rel. L. R. 179 (1959). In 1958, the Arkansas legislature authorized the closing of schools to prevent compliance with federal court orders to desegregate. Ark. Stat. 80-544, Acts 1958 (2d Ex. Sess.), No. 4, §1, p. 2000. Only two years earlier, South Carolina's legislature passed a joint resolution of *Interposition and Nullification*,⁵ obviously directed at the decisions of this Court in the field of segregation. On the statute books of Arkansas still stand requirements of segregation in railroad⁶ (including waiting rooms⁷), streetcars,⁸ buses,⁹ schools,¹⁰ penal institutions,¹¹ deaf and blind institutes for children,¹² chain gangs,¹³ any "establishment where gaming is legal,"¹⁴ and other places. Present law in South Carolina segregates station restaurants,¹⁵ railroads and steamboats,¹⁶ streetcars,¹⁷ chain gangs,¹⁸ circuses and traveling shows,¹⁹ collèges (which must close if

⁵ S. C. Acts and Joint Resolutions 1956, No. 914.

⁶ Ark. Stat. Ann. §73-1218 (1957).

⁷ *Ibid.*

⁸ Ark. Stat. Ann. §73-1614 (1957).

⁹ Ark. Stat. Ann. §73-1747 (1957).

¹⁰ Ark. Stat. Ann. §80-509 (1960).

¹¹ Ark. Stat. Ann. §§144, 145 (1947).

¹² Ark. Stat. Ann. §80-2401 (1960).

¹³ Ark. Stat. Ann. §76-1119 (1957).

¹⁴ Ark. Stat. Ann. §84-2724 (1960).

¹⁵ S. C. Code §§58-551 (1962).

¹⁶ S. C. Code §§58-714, 58-719, 58-720 (1962).

¹⁷ S. C. Code §§58-1331, 58-1340 (1962).

¹⁸ S. C. Code §§55-1, 55-2 (1962).

¹⁹ S. C. Code §5-19 (1962).

ordered to desegregate),²⁰ textile factories,²¹ parks,²² and schools.²³

With these laws on the books, it would outrage good sense to disregard the causal nexus that binds these states' segregation custom to their laws and policies, on the ground that it is politic to treat the past as something best forgotten. The past is still the official policy of Arkansas and South Carolina.

But even if that were not so, there is no reason to treat contemporaneity as the test of causality—to say that the firmness of the segregation custom can today owe nothing to the forces of law that surely gave it power for decades (if they did not partly create it), merely because that legal support is withdrawn, by the decisions of this Court if not by state repentence and repeal. The judgment that past institutions have no causal connection with the present is never warranted, but it should be particularly obvious that it is unwarranted in the context of race relations, where the rule of the past comes from so far back; even from the days of slavery.

It is not proposed that the present generation of Arkansans and South Carolinians be penalized for what their ancestors did²⁴—if that could be thought factually to the point, given the present-generation official stance of these states. It is rather proposed that, where Arkansas and South Carolina themselves move to send petitioners to jail for disobeying orders given in conformance with the segre-

²⁰ S. C. Code §22-3 (1962).

²¹ S. C. Code §40-452 (1962).

²² S. C. Code §51-2.1 (1962).

²³ S. C. Code §21-751 (1962).

²⁴ *Bell v. Maryland*, — U. S. —, —, 12 L. Ed. 2d 822, 860 (dissenting opinion).

gation custom that has for many decades been the keystone of the public policy of each state, the state not be allowed to visit this penalty on these petitioners, on the utterly unrealistic theory that state power is to no extent involved. The state "... will not be heard to make this contention ..." *Peterson v. Greenville*, 373 U. S. 244, 248, when the force of its policy has for so long been directed to maintaining a segregated society, a society in which store managers would, predictably in custom, give just such orders as these petitioners stand convicted of disobeying.

Nor is it, with the deepest respect, a valid objection to this argument, that the settled and state-supported custom of one section of the nation infects with Fourteenth Amendment invalidity actions taken in conformity to that state-supported custom, while the same conditions cannot be predicted of another section. Here is no question of leniency, or of two Fourteenth Amendments,²⁵ but of one Fourteenth Amendment, justly applied to conditions which in fact do vary. Cf. *In re Rahrer*, 140 U. S. 545 (1891). How could it be otherwise? The very question that is being asked is whether state power bears a causal relation to the discriminatory act. How could it be that the answer to this question would be the same, whether or not the particular state had for three-quarters of a century based its political and civic life on the proposition that such acts of discrimination are necessary and wholesome?

It would be most unlenient to the Negro in the South to close one's eyes to the fact that massive and long-lasting state policy has significantly contributed to the discrimination that affects him.

A connected point of less general application may be made. As shown above, statutes still in force in Arkansas and South Carolina command extensive segregation, in

²⁵ *Ibid.*

schools, transportation, and places of public resort, though none directly touches restaurants, except station restaurants, restaurants in waiting rooms, restaurants at certain places of public amusement, and (presumably) railroad dining cars.²⁶ These statutes are part of the present in the strictest sense; they raise no problem about causal connection with past policies. Petitioners submit that this Court may recognize that the custom of segregation is not a set of isolated phenomena but a general pattern,²⁷ and that the general custom of restaurant segregation is shored up and given dignity by the law's command that some restaurants, and other public facilities, be segregated.

This connection is emphasized by the fact that Congress, in Title II of the Civil Rights Act of 1964, has clearly recognized the intimate connection between travel and the enjoyment of public accommodations, including those of the very sort here involved. If the segregation of restaurants is a clog on travel, is it unreasonable to conclude that the segregation of travel reacts to reinforce restaurant segregation? If law has teaching authority, and if the restaurant keeper and his white patron know that the authority of the state's law teaches that Negroes are unfit to ride a streetcar in the same seats as whites, is it doubtful that they will be led, to some degree, to the conclusion that Negroes are unfit to eat at the same counter as whites?

In *Robinson v. Florida*, — U. S. —, 12 L. Ed. 2d 771, this Court held that, although no state statute commanded restaurant segregation, an administrative regulation requiring racially separated lavatories in non-segregated restaurants sufficiently burdened desegregation to amount to forbidden state action, since it was ". . . bound to discourage the serving of the two races together." 12 L. Ed. 2d at p.

²⁶ See *supra*, nn. 6-23.

²⁷ See *supra*, p. 46.

773. Surely the knowledge that the state maintains a segregation code as to many of the most important concerns of life amounts to a much greater discouragement. In Arkansas and South Carolina, the restaurant keeper who desegregates does so knowing that he thereby transgresses a state policy, expressed in many laws, that the races shall be kept apart. To conclude that the expense of a separate toilet is a greater discouragement to desegregation than is the state's official endorsement of travel, school, racetrack, or even station restaurant segregation, is to elevate the tangible above the moral. It is worse; it is to elevate the trivially tangible over the ponderous moral influence of the state's solemn judgment that segregation is wise and right, a judgment standing in its statutes where all may read. It is even more than that; it is to elevate the only seemingly tangible above the moral, for the administrative regulation given this effect in *Robinson* was obviously invalid, under the decisions of this Court, and could not in a pinch prevail. Like the Arkansas and South Carolina segregation laws, though on a much smaller scale than these, it could in the end serve only as an official state endorsement and espousal of the segregation principle.

B. *The Employment of the State Judicial Power, Together With State Police and Prosecutors, to Enforce the Racial Discrimination Here Shown, Constituted Such Application of State Power as to Bring to Bear the Guarantees of the Fourteenth Amendment.*

The doctrine of *Shelley v. Kraemer*, 334 U. S. 1 is here clearly applicable. That case settled the proposition that state action, of the kind requisite for invoking the Fourteenth Amendment, is to be found in the use of state judicial machinery to enforce a privately-originated scheme of racial discrimination. Unless that case is to be overruled, or irrationally "distinguished" away, it applies a

fortiori, to these cases, where not only the state judicial powers but also the powers of police, prosecutors, and attorneys-general have been brought to bear. In these cases, the police were on the alert, ready to act as formal witnesses to the "warning" required by the statute. The judicial proceedings were criminal in nature, carried on by the public prosecutor at public expense, with the state appearing as a party in its own interest, in knowing support of the discriminatory scheme, sanctioning the latter within its own public order, and not merely standing by to enforce private rights by civil process, as in *Shelley v. Kraemer, supra*.

It is submitted, with the utmost respect, that no suggested distinction of this case from *Shelley* is successful.

It is true that covenants at bar in *Shelley* were functionally equivalent to zoning ordinances, or could be so if adopted on a wide scale, as they doubtless were in many localities.²⁸ But this is not a ground of distinction of these cases from *Shelley*. Instead, the similarity is striking. Virtually universal, though nominally "private," discrimination in places of public accommodation, backed up by alert police and by criminal prosecution, is the exact functional equivalent of restaurant segregation imposed by city ordinances. It makes no difference to a Negro which of two legal formalities assures his being barred from all the good restaurants and most of the bad ones in town, any more than it made a difference to him which doctrinal route—"zoning" or "private covenant"—led to his being unable to live in the neighborhood he liked and could afford. Cf. *Terry v. Adams*, 345 U. S. 461.

²⁸ *Bell v. Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 857 (dissenting opinion).

The "property rights" act of 1866, 14 Stat. 27, 42 U. S. C. §1982, furnishes no ground of distinction.²⁹ That statute, which antedated the Fourteenth Amendment, was used by the *Shelley* Court only as an aid in establishing that the right to hold property was within the terms of the Amendment. 334 U. S. 10-11. That could hardly have been doubted. Both *Shelley* and *Hurd v. Hodge*, 334 U. S. 24, 31 explicitly recognize that the statute, like the Fourteenth Amendment, protects only against governmental action. The true problem in *Shelley v. Kraemer* was not whether the right to hold property and live in it was a protected right, as in some sense clearly it was, but rather whether that right was infringed by governmental authority, where the judicial power was lent to the enforcement of a purely private contractual scheme which practically frustrated the enjoyment of the right.

In the present cases, similarly, all must agree that petitioners have, in some sense, a "right," under the Fourteenth Amendment, not to be barred from restaurants. They have that right just as clearly as they have the right to purchase and enjoy property. The question is, against what kind of action, on whose part, does the "right" run? *Shelley* very clearly held that the "right" to enjoy property was infringed by forbidden state action when the judicial arm of the state lent its enforcement to a "purely private" arrangement.

Of course the right claimed here differs from that claimed in *Shelley*; one involves a house, the other a sandwich. The similarity of the cases is located at the very point at issue here—at the point of determining what defines "state action," not for the purpose of deciding whether the right is one the state may not invade—for that is obvious in both cases—but for the purpose of deciding

²⁹ *Ibid.*

whether the state *has invaded it*, by judicially supporting a discriminatory scheme of private origin. On this point, the cases are not materially distinguishable.

It has been said that a "property" right is being vindicated in these cases, and that this distinguishes *Shelley*.³⁰ It is not clear why this would make any difference. But in any case a strict "property" right, of great value to the possessor and adjudicated to be his by state law (the only law defining property rights) was present in *Shelley*—the easement created by the covenant.

The state court in *McGhee v. Sipes*, companion case to *Shelley*, so described it; see Record in U. S. Supreme Court in *McGhee v. Sipes*, 334 U. S. 1, No. 87, Oct. Term, 1947, p. 51. The brief of the respondents, in *Shelley*, very carefully argued the point that a property right, in the nature of a negative easement, was at stake.³¹ This property right was appurtenant to and importantly served the most valuable property right of all, the enjoyment of one's house. Yet this Court held that judicial vindication of this property right, whether in equity or by damages, *Barrows v. Jackson*, 346 U. S. 249, was forbidden.

It has been said that *Shelley* concerned only the willing buyer and the willing seller.³² This is wrong on the face of *Shelley*. The protagonist and chief actor was the most unwilling neighbor, the covenantee on a solemn obligation and the possessor of the property right in the nature of a negative easement, all of which he had acquired by "purely private" means, irrefragably valid under state law. The one and only reason for his being, in all prac-

³⁰ *Id.* at 858.

³¹ Brief for Respondents, p. 72, *Shelley v. Kraemer*, 334 U. S. 1.

³² *Bell v. Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 858 (dissenting opinion).

tical effect, deprived of the benefit of his contractual and property rights was that judicial action in merely enforcing them—not at all in creating them—was held to be forbidden by the Fourteenth Amendment.

So, in these cases, the restaurant owner has a "property right." Absent the Fourteenth Amendment, he could have the aid of the courts in using that property right to keep any Negroes from being where he did not want them to be and where his "property right" said he could keep them from being—just as, absent the Fourteenth Amendment, the owner of the valuable easement in *Shelley* could have the aid of the courts in keeping Negroes from living where the easement he held gave him the vested property right to exclude them. But there is a Fourteenth Amendment, and the extension of its ban to judicial enforcement of racial discrimination is as valid in the one case as in the other.

These cases do not raise the general question whether the Fourteenth Amendment forbids the prosecution of crimes against racists and their property.³³ Of course it does not. They raise, instead, the very question so clearly raised and settled in *Shelley*—whether the state may lend its aid to the enforcement of the racism itself, in the public life of the community. *Shelley* held that the state could not recognize and enforce a property right well settled under state law, where such enforcement gave sanction to a pattern of racial discrimination, even though the discrimination was "private" in origin. These cases present just that issue. Neither in *Shelley* nor here is any attack made on the right of the racist to be protected generally by the law.

The technical distinctions from *Shelley* quite fail. Equitable and prudential considerations powerfully suggest the

³³ *Id.* at p. 856.

undesirability of giving undeserved effect to such distinctions; on policy and equity, or as strict law, the present cases are not less but more appealing than *Shelley*. The setting up of arrangements to keep one's neighborhood white, however unworthy, has about it at least a slight flavor of the genuinely rather than the fictitiously "private." The identity and characteristics of one's neighbors are substantial matters, next door to the domestic. No reasons of equity or policy suggest the desirability of searching out forced distinctions between these cases and *Shelley*, with which they are so impressively similar, in that the key factor in both instances is the knowing use of the judicial power to enforce racial discrimination.

(It has been suggested³⁴ that the Civil Rights Statute cited above, 42 U. S. C. §1982, has some inverse application to cases of this sort, and that, by virtue of its terms, the owner of premises such as those involved in the present cases enjoys a ". . . federally guaranteed right . . .," a ". . . federal right . . ." against the entry of unwanted customers. With the greatest respect, it must be pointed out that the allowing of any such ". . . federally guaranteed . . ." right would have the effect of invalidating state public accommodations statutes. The statute, on its face, guarantees only such rights as are enjoyed by all "white persons." If no such persons may invoke the judicial machinery to enforce racial discrimination, it would seem that the statute is fully satisfied.)

Petitioners recognize that the *Shelley* doctrine might, unless means of principled limitation are available, lead to invasion of the purely private life, for the truth is that "state action" of the *Shelley* kind often supports or stands ready to support the authentically private choices of the individual in his family and social life. Petitioners intend

³⁴ *Id.* at 859.

to urge upon the Court that the road to avoiding this unwarranted and absurd result lies not in elaborating unsound distinctions in the realm of "state action"—which is obviously present here at least as much as it was in *Shelley*—but rather by the application of a reasonable canon of interpretation to the substantive guarantees of the Fourteenth Amendment. See Point II-D, *infra*.

Finally, under this Point and with reference back to Point II-A, petitioners argue that, if either of them be thought insufficient, in coaction they are irresistible. In their well known social and historical context, these cases are convictions, procured by the state, with its police, prosecutors, and judicial machinery, for failure to obey an order given in compliance with a custom which it has been the dearest interest of the state to foster, and to which the state now generally gives moral sanction by a Jim Crow code still on the books. If these convictions are to stand, on the theory that there is no state action in any form, *Civil Rights Cases*, 109 U. S. 3, 14, then the "state action" concept has come to be a symbol of futile technicality, lacking relation to life.

C. The Obligation of These States Under the Fourteenth Amendment Is an Affirmative One—the Affording of "Equal Protection of the Laws." That Obligation Is Breached When, as Here, the State Maintains a Regime of Law Which Denies to Petitioners Protection Against Public Racial Discrimination, and Instead, Subordinates Their Claim of Equality in the Common and Public Life of the States to a Narrow Property Claim, Enforcing the Subordination by the Extreme Sanction of the Criminal Law.

On the face of the "equal protection" clause, that clause imports no requirement of "state action." "State action"—a lawyer's shorthand term nowhere occurring in the Constitution—is manifestly inapt to the equal protection clause. What that clause says is that a state may not deny "equal

protection of the laws." "Denial" may be by inaction alone, as well as action, or by the subtle combination of inaction and vigorous action that marks the cases now at bar.

It is submitted that the obligation imposed on the state is that of maintaining a regime of law in which—without reference to those barren distinctions between action and inaction which have proven so useless in other fields of law—the Negroes, whose protection was the dominating purpose of the Fourteenth Amendment, are in fact protected against gross discrimination in the common public life of the states.

The historical evidence supporting this view of the Fourteenth Amendment, and especially of its equal protection clause, has been so recently and so fully presented in this Court as to make otiose its full review.³⁵ Petitioner's believe that it is of much greater importance—of decisive importance—to be clear about just what it is that one may look to see established by the historical data so lately canvassed.

Petitioners do not contend that the enormous mass of historical evidence on the adoption of the Fourteenth Amendment, and of the statutes tied in time and temper with that Amendment, establishes, without any contradiction and without any countervailing evidence, that two-thirds of each House of the 39th Congress, and a majority of each house of three-quarters of the ratifying state legislatures would have thought that the Fourteenth Amendment put the states under an obligation to maintain regimes of law in which these petitioners would be protected against public discrimination at lunch counters in establishments to which they were invited as customers. Where general language is used, for general purposes, that kind of burden

³⁵ Brief for the United States as Amicus Curiae, pp. 111 ff, *Bell v. Maryland*, — U. S. —, 12 L. Ed. 2d 822; *Bell v. Maryland*, 12 L. Ed. at 832.

can almost never be maintained. It could not be maintained as to the Fourteenth Amendment right of Negroes to be tried by juries selected without racial bias. It could not be maintained in regard to the holding in *Buchanan v. Warley*, 245 U. S. 60, or in *Brown v. Board of Education*, 347 U. S. 483. It assuredly could not be maintained as to the holdings in *Terry v. Adams*, 345 U. S. 461, or in *Marsh v. Alabama*, 326 U. S. 501. It could not have been maintained, *mutatis mutandis*, as to the holding in *Martin v. Hunter's Lessee*, 14 U. S. (1 Wheat.) 304. History rarely, if ever, affords that kind of aid to the expounding of Constitutions.

On the other hand, nothing remotely approaching a definite negative showing on the same question can be made. Here petitioners refer, with deep respect, to the dissenting opinion in *Bell v. Maryland*, — U. S. —, —, 12 L. Ed. 2d 822, 850. That opinion, in its Part IV, argues either from silence or from the irrelevance of evidence elsewhere cited; nothing positive is cited to establish the affirmative existence of an intent to exclude from the Amendment's reach such state actions, and inactions, as these cases illustrate.³⁶

Petitioners submit, therefore, that nothing in history can obviate the necessity for this Court's looking to the general purposes of the Reconstruction Amendments, and then individuating and making concrete those purposes, in this year, and in the light of all that is this year known concerning the position of the Negro in our society, the public importance of public accommodations, and the relations of state power to private power.

Petitioners submit that, for this purpose, the history referred to in Mr. Justice Goldberg's concurring opinion in *Bell v. Maryland*, — U. S. —, —, 12 L. Ed. 2d 822,

³⁶ See *Bell v. Maryland*, — U. S. —, —, 12 L. Ed. 2d 822, 860-865 (dissenting opinion).

832, and in the Supplemental Brief as Amicus Curiae filed by the United States in that case (at pp. 111 ff.), by a very heavy preponderance establishes that the guarantee to Negroes of equal access to places of public accommodation ought to be taken to be one of the characteristics of the regime of law which the states are commanded, by the Fourteenth Amendment, to maintain. The historical data put forward in those places show a purpose to require the maintenance of a society of substantial as well as formal equality, with respect to the public life of the community.

Beyond this point, and with little more help from history, this Court must proceed as in the earliest cases under the Amendment:

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 71.

One great purpose of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. *Ex parte Virginia*, 100 U. S. 339, 344-345.

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. *Strauder v. West Virginia*, 100 U. S. 303, 307-308.

The legal systems of Arkansas and South Carolina were confronted with an unavoidable choice. Two interests are asserted. One is the interest of the owners of real property, dedicated to a public business, generally opened to the public, and opened even to Negroes in all respects but one, in effecting a racial discrimination with respect to facilities dispensing the prime necessity of life. The other is the interest of Negroes in being free from the tangible inconveniences and moral humiliation of widespread racial discrimination in respect to the enjoyment of facilities otherwise altogether public. The choice between these interests is a real choice.³⁷ It does not lie in the nature of things that one or the other must prevail. The legal system that makes the choice is doing something. It is affirmatively

³⁷ Cf. *Bell v. Maryland*, — U. S. —, —, 12 L. Ed. 2d 822, 847-849 (concurring opinion); *Id.* at pp. 873-875 (opinion of Justice Douglas).

electing to deny to Negroes the protection of the laws in one respect, while granting the laws' protection to widespread racial discrimination against them. Such a decision is not and cannot be merely neutral; it weighs interests and selects one for favoring and one for rejection.

In the cases imposing segregation by law under that name, the state had weighed the interest of Negroes against the interests of those whites who desired segregation, and struck a balance in favor of satisfying the desires of the latter. That decision was nullified by the Fourteenth Amendment. In these cases, the state has weighed the interests of the Negroes against the property interests of store proprietors, and struck a balance in favor of the latter. But the property claim of a store owner has no greater dignity than the psychological comfort of white citizens who want to eat in segregated surroundings and who implement that preference by successfully supporting the passage of segregation laws. If the latter interest is not of sufficient weight to justify the state in supporting segregation, why should the former be? If no consideration of policy can justify the state in choosing to support segregation in public places, how can a narrow "property right," which as a live interest consists only in the right to exclude Negroes, have that effect?

"Property" is a part of law, and has its being in law. American states and foreign nations do in fact balance the claims of "property" against other claims, including the claim to be free of racial discrimination. Free access to places of public accommodation is one of the things our legal culture commonly regulates, it is something law may be expected to deal with.

The denial of protection against racial discrimination in regard to places of public accommodation is a matter of substance, both tangibly and morally. The regime that

denies this protection breaches its affirmative obligation under the Fourteenth Amendment.

It has long been recognized by this Court that a state, by merely permitting activity which frustrates a constitutional guarantee, may violate the Constitution. The opinions in *Terry v. Adams*, 345 U. S. 461, are instructive:

For a state to *permit* such a duplication of its election processes is to *permit* a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to *permit* within its borders the use of *any device that produces an equivalent* of the prohibited election (Justice Black (with Justices Douglas and Burton), 345 U. S. at 469). [Emphasis added.]

The application of the prohibition of the Fifteenth Amendment to "any State" is translated by legal jargon to read "State action." This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored (Justice Frankfurter, 345 U. S. at 473).

The evil here is that the State, through the action *and abdication* of those whom it has clothed with authority, has *permitted* white voters to go through a procedure which predetermines the legally devised primary (at 345 U. S. at 477). [Emphasis added.]

Consonant with the broad and lofty aims of its Framers, the Fifteenth Amendment, as the Fourteenth,

"refers to exertions of state power in all forms." Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization, the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play (Mr. Justice Clark with Chief Justice Vinson and Justices Reed and Jackson, 345 U. S. at 484).

The cases at bar are sharper. Here the state not only permits conduct which frustrates and makes worthless the Fourteenth Amendment guarantee against segregation by public power, but also puts the weight of its criminal sanctions behind that conduct. Cf. *Burton v. Wilmington Parking Authority*, 365 U. S. 715; *McCabe v. Atchison, Topeka & S. F. Ry. Co.*, 235 U. S. 151; *Lynch v. United States*, 189 F. 2d 476 (5th Cir. 1951), cert. den. 342 U. S. 831; *Catlette v. United States*, 132 F. 2d 902 (4th Cir. 1943).

It recently has been pointed out that the opinion in the *Civil Rights Cases*, 109 U. S. 3, explicitly rested on the assumption that a failure by the state to provide equal access to places of public accommodation would bring the Fourteenth Amendment into play. Mr. Justice Goldberg, concurring in *Bell v. Maryland*, — U. S. —, —, 12 L. Ed. 2d 822, 844-45. Cf. *United States v. Cruikshank*, 92 U. S. 542, 554-555.

Petitioners have contended here that the Fourteenth Amendment imposes an affirmative obligation on the states to protect against public racial discrimination. It is clear, however, that federal judicial enforcement of that obligation, in its affirmative sense, would present difficult problems. Congress has now filled a part of the gap. It may be that, as an affirmative obligation unsupported by implementing statute, this obligation would have to remain partly

a moral one; cf. *Kentucky v. Dennison*, 65 U. S. (24 How.) 66. But these cases raise none of these questions. If the states, as petitioners here contend, have even so much as a moral obligation, under the Fourteenth Amendment, to maintain legal systems such as to make impossible this gross public racial discrimination, then *a fortiori* no state may, as in these cases, set its criminal law enforcement machinery affirmatively in motion to support and defend that discrimination.

**D. None of the Theories of "State Action" Urged by Petitioners
Needs to Result in the Extension of Fourteenth Amendment
Guarantees to the Genuinely Private Concern of Individuals,
for a Reasonable Interpretation of the Substantive
Guarantees of the Amendment Can and Ought to Prevent
That Result.**

Petitioners have urged that:

1. Where state-supported custom is the matrix of the nominally private act of discrimination, the requisite "state action" is found (II-A).
2. Where state judicial and prosecutorial power implements and enforces racial discrimination, the requisite "state action" is present, under the rule of *Shelley v. Kraemer*, 334 U. S. 1 (II-B).
3. Where the state maintains a regime of law giving legal sanction to widespread racial discrimination in public places, the state so acts as to "deny" equal protection of the laws (II-C).

It is submitted that no one of these theories concerning "state action" is in itself difficult to follow or to accept. Uneasiness about each of them, and about their coercive effect, springs, it is respectfully suggested, from the fear that following their logic to the limit will result in the

application of Fourteenth Amendment standards to the truly private life.

Petitioners submit that this result, unwanted and absurd, is logically to be avoided not by the elaboration of unsound distinctions in the realm of "state action," but rather by the discernment and use of a canon of interpretation of the Fourteenth Amendment, limiting that Amendment's force to the functionally public life. That methodologic line, broadly warranted both by the history of the Amendment and by its placement in the total legal and racial context of our civilization, has the great merit of attempting to draw the line in the place where the line is needed and wanted. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962).

In these cases, the records show that no private or personal associational interest is at stake. The "owners," ultimately responsible for the decision to exclude petitioners, do not personally figure in the events shown by testimony. Nothing but a palpably fictitious personification can bring any personal associative interest into these cases at all. See the opinion of Mr. Justice Douglas in *Bell v. Maryland*,

— U. S. —, —, 12 L. Ed. 2d 822, 867, where the totally fictitious character of the "personal" associational interests in these cases is exhaustively shown. It must be an uncomfortable argument that can make its points only by systematic metamorphosis of a business corporation into a human being—by the systematic substitution of "he" for the correct "it," of "his" for the correct "its."

By the same token, these cases concern events in the fully public life, the part of life where privacy and private choice are generally irrelevant. No one expects to choose his surrounding company in a public restaurant, and customer-by-customer "choice" by proprietors or managers is as good as unknown. Restaurant racial segregation, on

the other hand, is a regional and national public problem. It defines the public racial character of cities and states. It is a feature of that part of life to which "citizenship" is fully relevant, if the "citizenship" granted by the Fourteenth Amendment is more than the right to be called a "citizen" while being publicly treated as a sub-human. See Mr. Justice Harlan, dissenting in *The Civil Rights Cases*, 109 U. S. 3, 46-47; cf. U. S. Const., Art. IV, §2.

There is no competing federal constitutional claim, such as the interest in freedom of religion or freedom from unauthorized search and seizure, to be weighed against petitioners' claim to immunity from public racial discrimination. Cf. Henkin, *op. cit. supra*, at pp. 495, 496.

The business places here concerned are abundantly regulated by law; their conduct is a part of the normal regulatory regime of modern law. South Carolina right now has on its books a regulation requiring segregation in carrier station restaurants; Arkansas, by regulating access to certain public places, imposes regulation, by necessary consequence, on the formation of the restaurateur-patron relationship in those places. How can these states be heard to assert that "private choice" is relevant to these situations?

De facto segregation, by corporate ownership choice in coaction with state criminal law, is the exact functional equivalent of that segregation by law which is forbidden by the Fourteenth Amendment. A minimal and technical "property" interest is made to support a regime exactly resembling that segregation which the Fourteenth Amendment forbids. Cf. *Terry v. Adams*, 345 U. S. 461, 466, 470.

None of these considerations, it must be made clear, literally supplies "state action." "State action," rather,

is to be found in these cases under the theories expressed in Points II-A to II-C, *supra*. The considerations just rehearsed suggest the means for bringing it about that realistic and clear-sighted views on "state action" not bring the Fourteenth Amendment into the living-room. The way to keep it out of the living-room is not to pretend that state power does not support the choices made in the living-room—for clearly it does—but rather, to consider those very factors which make it absurd, within our legal culture, to suppose that it substantially ought to be interpreted to reach the living-room. Those factors have to do not with "state action," but with genuine as opposed to fictitious privacy. They are factors which go not to the presence or absence of "state action," but to the reasonable interpretation of the substantive guarantees of the Fourteenth Amendment.

This Court could not now, without violating all the wisdom of the case-law process, attempt to decide every case that intellectual curiosity might imagine, along the border-lines suggested by the above considerations. But this Court can now take note of the fact that amply sufficient considerations, resting on the broadest common sense and quite outside the "state action" field of force, can be invoked, if the need should ever arise, to keep the Fourteenth Amendment out of the authentically private life of man, without conjuring away the "state action" that so palpably exists in these cases.

It has been suggested that the acceptance of theories similar to those urged here would leave the Court helpless to draw reasonable lines, adapted to keeping the Constitution out of purely private relations.³⁸ The "state action" concept has proven to be very far from a precise tool for this

³⁸ *Bell v. Maryland*, —— U. S. ——, 12 L. Ed. 2d 867 (dissenting opinion).

purpose. Nor is it true that legislation can or does exempt the Court from weighing and assessing factors definable only by degree.³⁹ In administering the new Civil Rights Act, for example, the courts will have to decide, presumably, whether "reasonable cause" exists to believe that a "pattern or practice" of segregation exists (§206). Nor is this process of judicial weighing confined to those cases where the statute clearly invokes it. Whether, for example, a proprietor "actually occupies" an establishment as his "residence" (§201(b)(1)) can very surely, in the borderline cases, call for a court's assessment of matters of degree.

Such decisions must always be made by courts. See Holmes, *J.*, partially concurring in *LeRoy Fibre Co. v. Chicago M. & St. P. Ry.*, 232 U. S. 340, 354. The important thing is to try to locate the line between the very things it is desired to keep separate. In this context, the line is needed between discrimination in the public common life of communities and discrimination in the private life of individuals. Its location there, with whatever vagueness at first, at least puts it between the things that ought to be separated, in consonance with the spirit and purpose of the Fourteenth Amendment. The "state action" concept can draw that line only by accident, by conceptual manipulation; it never can begin to draw it right. The concept of an opposition between the public, communal life, and the private life, is a beginning toward drawing the right line. That beginning once made, these cases present no problem, for they are a very long way from the line.

³⁹ *Id.* at 866, 867.

III.

These Convictions Violate Due Process in That There Was Inadequate Conformity Between Definite Statutes and the Conduct Proved.

A. These Convictions in Both Cases Violated Due Process of Law, in That They Were Had Under Statutes Which, in the Procedural and Evidentiary Context, Fail to Designate as Criminal the Conduct Proven, With the Clarity Required Under Decisions of This Court.

In the very recent case of *Bouie v. Columbia*, — U. S. —, 12 L. Ed. 2d 894 (1964), this Court had occasion to apply, to a "criminal trespass" statute of South Carolina, the settled rule that due process is not afforded where punishment is inflicted under a statute which fails, as a matter of ordinary language, to designate the conduct shown by evidence in the case. As that opinion suggests, — U. S. at pp. —; 12 L. Ed. 2d at pp. 897-98, the objection to such a conviction may be in the alternative, where the language of the statute is seemingly precise. On the one hand, a conviction on a record showing conduct that does not fall at all within the normal meaning of the statute as written may be repugnant to the rule of *Thompson v. Louisville*, 362 U. S. 199, as constituting conviction without any evidence of commission of the crime charged. On the other hand, if a judicial fiat of "construction" stretches the statute to cover, in defiance of the ordinary meaning of words, then the application of that construction violates due process.

If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in *Lanzetta*, or to "guess at [a statute's] meaning and differ as to its application," as in *Connally*, the violation is that much greater when,

because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the conduct in question.

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States*, 314 U. S. 306, 311, 62 S. Ct. 237, 239, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Bouie v. Columbia*, — U. S. at p. —, 12 L. Ed. 2d at p. 899.

The cases at bar fall under one or the other of these principles. Probably the second is the more applicable. But in either event the convictions must be reversed.

The Arkansas statute reads as follows:

Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00), or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment. Acts 1959, No. 14, §1.

The South Carolina situation is more complicated. The warrant of arrest in the *Hamm* case designated no statute, and the prosecutor refused to make election among the

statutes under which he might have been thought to be proceeding (R. Hamm 6, 7). This fact constitutes a separate ground, though closely involved with the one now immediately under scrutiny, for reversal, and will be discussed in Point III-B. For present purposes, it may be assumed⁴⁰ that the City's chief reliance was on Section 16-388 (2), Code of Laws of South Carolina, 1952, as amended 1960:

Any person:

- (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or
- (2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative, shall on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

It is to be observed that both the Arkansas and the South Carolina statutes are of very recent vintage: neither has any solid history of judicial construction.

On its face (saving minor and irrelevant differences of phraseology), each of these statutes requires the following elements for the establishment of criminality:

1. Entry by defendant into the premises of another person.

⁴⁰ If the assumption is denied, then these convictions clearly fall, for the other two statutes that figured would ground reversal, on the authority of *Bouie v. Columbia*, — U. S. —, 12 L. Ed. 2d 894. See Point III-B, *infra*.

2. Refusal by defendant to depart from those premises. (This is spelled out literally, in the Arkansas Statute, by the word "therefrom". But the case is no less clear for South Carolina; it is impossible, in the context, to imagine any other meaning for "leave" than "leave what has just been referred to as having been entered into, namely, the dwelling house, place of business, or . . . premises of an other person . . .").

3. The prior giving, by an authorized person, of an order or request to leave the premises or place of business. (As for the Arkansas statute, the "request" must be a "request" to do what has just been referred to, "depart therefrom"—namely, from the "business premises." As for the South Carolina statute, the order or request "to do so" is an order or request to leave the dwelling house, place of business, or premises: "to do so" has nothing else to which to refer. If this is not what the language means, one would have wholly to guess at its meaning.)

It is affirmatively shown, on the clear testimony of the prosecution's own principal witnesses in each of these cases, that the order given was not an order to leave "the premises," or the "place of business," in any normal acceptance of these words, but an order to leave one particular section of "the premises," one location in the "place of business." One may disapprove of that refusal; one may even think it a civil wrong. But it does not fall within the terms of the statute.

In *Hamm*, one need go no further than the Arrest Warrant (R. Hamm 2), where the "unlawful trespass" was "remaining at the lunch counter," and "refusing to leave said counter . . . after the Manager of said store . . . advised him that he would not be served and specifically requested him to leave said lunch counter . . ." Captain Hunsucker, the arresting officer, testified that the Manager, in his

hearing, told petitioner that ". . . he would have to ask them to leave the lunch counter." The very same order ("I will ask you to leave the lunch counter") was then given by Captain Hunsucker. The same officer testified that the Manager, at this same time, advised the petitioner's companion that he could go to the check-out counter to get a refund (R. Hamm 14). This statement is absolutely incompatible with an order to "leave" the premises "immediately." See South Carolina Code §16-386. On the other hand, all this was against a background of general welcome to Negroes, as far the rest of the premises was concerned (R. Hamm 61). The petitioner was welcome on "the premises" and was never asked to leave "the premises." This lunch counter was simply one of the departments of the whole store, across an aisle from another department (R. Hamm 58). It is clearly shown that what was given here was not an order to leave the premises, but an order to move away from one small section of the premises, in no way disconnected from the rest, and forming, *in union* with the other "departments" (i.e., counters) and not in disjunction from them, what would in ordinary language be called the "premises" or "place of business" of McCrory's in Rock Hill.

The *Lupper* situation is similar. The expression "asked to leave" occurs several times in testimony, but the ambiguity is resolved in the state's own testimony. Of the Manager, Officer Terrell testifies "He told us that he had two boys that had refused to leave the *lunch counter* . . ." "He had requested our assistance to get them out *from the lunch counter*" (R. Lupper 29). To another sit-inner, one of the store managerial personnel said ". . . we are not prepared to serve you at this time and will you kindly excuse yourself. (R. Lupper 42)," a colloquialism for "leave the table." This lunch counter, on a mezzanine freely accessible by stairs, was simply a part of the "business prem-

ises." No order was ever given, clear or unclear, that these petitioners leave the business premises. The order alleged to have been given was to move away from one part of the business premises; nothing suggests that, if they had moved away from that part they would not have enjoyed the general permission all Negroes enjoyed to shop in the Gus Blass Store (R. Lupper 54).

A general construction of these statutes which would make them fit these cases would have utterly ludicrous results. Such a construction would mean that if a lady came to the ribbon counter in McCrory's, and a clerk thereunto authorized requested her to move away from the ribbon counter, and she stood there two minutes and a half (R. Lupper 47—state's witness said three to five minutes elapsed from his "request" until his return with officers from across the street, by which time petitioners had left the lunch counter and were some distance away from it), then she could be fined a substantial amount of money and sent to jail, though her behavior was orderly and no damage ensued. It may be that such a law would be valid. But it would clash so sharply with all our cultural assumptions that the legislature would have to say very clearly that that is what is meant.¹¹ In these cases, the legislature has said rather clearly that that is not what is meant. To stretch these laws to cover these cases, one has to take "business premises" or "place of business" to mean not "the business establishment as a whole," but "such section therein as management may, *ad hoc* and without saying so, choose to designate as a separate parcel of land." Such a construction constitutes exactly the sort of judicial ambush that

¹¹Such a requirement is not an unreasonable one, *cf.* Va. Code §18.1-173 (1960): "If any person shall without authority of law go upon the . . . premises of another, or any part, portion or area thereof . . . he shall be deemed guilty of a misdemeanor . . ." [Emphasis added.]

was condemned in *Bouie v. Columbia*, — U.S. —, 12 L. Ed. 2d 894 (1964).

In that case, moreover, this Court had occasion to reaffirm the ancient distinction between civil and criminal trespass. — U. S. at pp. —, 12 L. Ed. 2d at pp. 902, 903. If a man is standing by the pickles, in a large delicatessen, and the Manager tells him, "Please move at least six feet away from the pickles," and if he stubbornly stays where he is (in other respects behaving well), then perhaps he is civilly liable for such damages as can be shown to have ensued. It may even be that the Manager, using force to move him, could validly plead *manus molliter imposuit*, though one would expect, even on this, that pretty square corners would have to be cut. But the trespass, if any, is criminal only if clearly covered by a criminal trespass statute, and such statutes are not and have never been anywhere near coterminous in their coverage with the law of civil trespass.

It is cheerfully admitted that these parallels seem at first blush fanciful. The reason is simple: it would seem unnatural and bizarre to bring the criminal law to bear in the cases imagined, while the employment of that law seems expectable and natural in the cases at bar, for all too obvious a reason. But these statutes must be judged and construed in their sweeping generality and neutrality; it is only their appearance of possessing those qualities that saves them at all. In that sweeping generality, considered as purely neutral enactments, they must either, as they seem to do on their face, make criminal only the well-understood act of failing to leave the "premises" *after being ordered to leave the "premises,"* in the normal understanding of the quoted word, or else they make criminal any disobedience to *any* order of a proprietor with respect to the *part* of the "premises" where a person generally

welcomed may sit or stand for a very short time. In the first and more natural meaning, no evidence in these records shows their violation here. (*Thompson v. Louisville*, 362 U. S. 199.) If the second and grossly strained meaning be given to them by judicial fiat, these convictions are obnoxious to the rule of *Bouie v. Columbia, supra*.

The distinction here is a highly substantial one. A state might wish to put its criminal law behind the desire of a proprietor to be altogether rid of certain people, without desiring to place the same extreme sanction behind his orders to them as to where they may sit or stand. Ordering a man out of your house, and ordering him not to sit in a certain chair, are two different things. It is the first of these things, on any normal understanding of English, that these statutes bring under the extraordinary coverage of criminal trespass law.

The appropriateness of a strict insistence on the actual communication of the very order required by the applicable law is brought out, on different facts, by Mr. Justice Harlan, concurring in *Garner v. Louisiana*, 368 U. S. 157, 197, 198:

Nor do I think that any such request is fairly to be implied from the fact that petitioners were told by the management that they could not be served food at such counters. The *premises* in both instances housed merchandising establishments, a drug store in *Garner*, a department store in *Houston*, which solicited business from all comers to the stores. I think the reasonable inference is that the management did not want to risk losing Negro patronage in the stores by requesting these petitioners to leave the "white" lunch counters, preferring to rely on the hope that the irritations of white customers or the force of custom would drive them away from the counters. This view

seems the more probable in circumstances when, as here, the "sitters'" behavior was entirely quiet and courteous, and, for all we know, the counters may have been only sparsely, if to any extent, occupied by white persons. [Emphasis supplied.]

This passage incidentally, illustrates the normal usage of the word "premises."

These convictions, moreover, penalize actions which were expressive of claims and of views. *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, 310 U. S. 88. The requirements of statutory clarity are in such cases, for reasons often stated by this Court, higher than in the general case. *Winters v. New York*, 333 U. S. 507.

To summarize, these statutes forbid disobedience to an order to leave the "premises" or "place of business." No such order was given here; the order that was given was an order to move away from one counter on the "premises" or in the "place of business." That such an order is not tantamount to an order to leave the premises or the place of business is shown with logical rigor by the fact that one could obey it and still be on the premises and within the place of business. Petitioners have been convicted of a highly artificial offense, but the artifice has been unsuccessful, because the records show that even that offense was not committed, and these convictions must fall under the rule of *Bowie v. Columbia*, — U. S. —, 12 L. Ed. 2d 894, or under the rule of *Thompson v. Louisville*, 362 U. S. 199.

B. In the Hamm case, the Defendant Was Denied Due Process of Law by the Refusal of the Prosecutor and Trial Judge to Specify the Law Under Which He Was Charged, by the Consequent Vagueness of the Law Set Forth in the Instructions to the Jury, and by the Variance Between the Law Charged the Jury and the Law on the Basis of Which the State Appellate Courts Sustained Defendant's Conviction.

There is an independently sufficient ground for outright reversal of the conviction of petitioner Hamm. The arrest warrant charged Hamm only with "Trespass," naming no statute (R. Hamm 3). The supporting affidavit, incorporated in the warrant, charged that Hamm "did willfully and unlawfully trespass upon privately owned property by remaining . . . at the lunch counter in McCrory's variety store, which is customarily operated upon a segregated basis, and refusing to leave said counter . . . [reciting facts], all of which resulted in and constituted a trespass by the above-named defendant, contrary to the peace and dignity of the State of South Carolina, and in violation of the ordinances of the City of Rock Hill. . . ." (R. Hamm 2, 3).⁴² Before trial, defense counsel attempted to have the judge require the prosecutor to specify the offense charged, pointing out "that as a matter of due process of law, . . . there are several criminal statutes on the book, and we think that we are entitled to know if they are relying on any ordinance or statutes, specifically which one we are

⁴² Among the facts recited in the affidavit was that "racial tension was high due to numerous recent prior demonstrations against segregated lunch counters . . . both within the City and throughout the South generally, followed by numerous recent trials of demonstrators before this and other Courts. . . ." (R. Hamm 2). The affidavit was amended immediately before trial "to eliminate the references therein to what we have referred to as the background situation" (statement of Mr. Spence, the prosecutor, at R. Hamm 5), although the amended form does not appear in the record. Obviously the amendment did nothing to clarify the charge, for the prosecutor thereafter insisted on his right to rely on "all of the available law." See succeeding text.

going to have to defend against" (R. Hamm 6). The prosecutor took the position that he relied "upon all of the available law that has a proper bearing upon a relationship to the offense charged" and that "we are not required to specify or spell out exactly what body or provision of law we rely upon, but that we are in fact to rely upon any law which the proof of the facts alleged in the warrant would bring into force, with reference to the offense charged" (R. Hamm 6).

Replying to the court's suggestion that he mention "any specific section which you are including without limiting yourself" (R. Hamm. 7), the prosecutor said "amongst other things" (*ibid.*) he relied on (a) the 1960 order-to-leave-the-premises statute, S. C. Code §16-388(2), set out in part III-A *supra*, p. 72; (b) the entry-after-notice statute, S. C. Code §16-386, *supra*, pp. 4-5, considered by this Court and held insufficient to permit conviction on similar facts in *Bouie v. Columbia*, — U. S. —, 12 L. Ed. 2d 894; and (c) a Rock Hill ordinance, §19-12 of the Code of Laws of the City of Rock Hill, *supra*, pp. 5, 6, which is on its face unquestionably subject to the same objections that prevailed in *Bouie v. Columbia* with respect to S. C. Code §16-386 (R. Hamm 7). All of this was "without giving the right to rely upon other sections" (*ibid.*), a right in which the trial judge sustained the prosecution (*ibid.*).⁴³

The judge's charge did nothing to clear up the matter. The court began by stating that the defendant was charged with "the offense of trespass" (R. Hamm 84). "If you want to know then what is meant by trespass," the court proceeded to read a portion of the 1960 order-to-leave-the-premises statute, S. C. Code §16-388(2), which does not

⁴³ In arguing motions for directed verdict and judgment of acquittal, defense counsel again pointed out that he was hampered by lack of specificity of the charge, and requested an election by the prosecution (R. Hamm 38).

speak of trespass (*ibid.*). Leaving no doubt that the defendant could be convicted outside the statute, the court continued by charging on trespass generally, including examples clearly unrelated to 16-388(2):

"I charge you further that a trespass is the doing of unlawful act, or of lawful acts in an unlawful manner, to the injury of another's person or property, an unlawful act committed with violence, actual or implied, causing injury to the person, property, or relative rights of another, and an injury or misfeasance to the person, property or rights of another, done with force and violence, either actual or implied in law."

"It comprehends not only forcible wrongs, but also acts the consequences of which make them tortious, of actual violence; an assault and battery is an instance; of implied, a peaceable but wrongful entry upon a person's land, or the wrongful remaining upon one's property after ordered to leave. Trespass to property is a crime at common law when it is accompanied by or tends to create a breach of the peace. When a trespass is attended by circumstances constituting breach of the peace it becomes a public offense, subject to criminal prosecution" (R. Hamm 84, 85).

This was followed by a second statement of the terms of 16-388(2), including the element of refusing to leave premises after orders to leave "without good cause or good excuse" (R. Hamm 85). The latter phrase was said to mean a cause or excuse "valid in the eyes of the law" (*ibid.*), but no instructions concerning applicable law were given; rather the "determination of good cause or good excuse is a question of fact for you, gentlemen of the jury" (*ibid.*). The court did not indicate whether a defense of "good cause or good excuse" was available for any other sort of trespass than that said to be condemned by 16-388(2).

The jury found the defendant "guilty" generally (R. Hamm 92). On appeal to the Sixth Judicial Circuit, Judge Gregory affirmed the conviction, obviously without reliance on S. C. Code §16-388(2), since his opinion states that he finds "no distinguishing features" between Hamm's case and another trespass conviction, affirmed in the same opinion, involving a trespass "before enactment of the 1960 Trespass Act" (R. Hamm 97).⁴ The Supreme Court of South Carolina in turn affirmed, relying exclusively on §16-388(2) (R. Hamm 101-105) (notwithstanding its later order on motion for a stay recites that Hamm was convicted of the common law offense of breach of the peace, R. Hamm 107).

What emerges from this confusing record, in which nobody yet seems to have got straight the offense of which Hamm was convicted, is this: (A) To the extent that the jury was permitted to convict on a theory of "peaceable but wrongful entry" (R. Hamm 85), the charge could be grounded only upon S. C. Code §16-386 or Rock Hill ordinance §19-12. (See the prosecutor's argument at R. Hamm 49-50.) Conviction so seated is impermissible under *Bouie v. Columbia, supra*, and a charge permitting it as one of several alternatives requires reversal under the principle of *Stromberg v. California*, 283 U. S. 359, and *Williams v. North Carolina*, 317 U. S. 287. (B) To the extent that the jury was permitted to convict on the theory that Hamm had done injury to McCrory's "relative rights" by an act of "implied" violence (R. Hamm 84), or an act which "tends to create a breach of the peace" (R. Hamm 85) conviction was had on no evidence. *Thompson v. Louisville*, 362 U. S.

⁴ Judge Gregory relied upon *Greenville v. Peterson*, 239 S. C. 298, 122 S. E. 2d 826 (1961), *rev'd*, 373 U. S. 244, and *Charleston v. Mitchell*, 239 S. C. 376, 123 S. E. 2d 512 (1961), *rev'd*, — U. S. —, 12 L. Ed. 2d 1033 (R. Hamm 98). *Peterson* sustained convictions under S. C. Code §16-388(1), (2)—probably principally under subsection (2). *Mitchell* sustained convictions under §16-386 on a theory of trespass *ab initio*.

199; *Garner v. Louisiana*, 368 U. S. 157; *Taylor v. Louisiana*, 370 U. S. 154, and, in any event, is forbidden by the First and Fourteenth Amendments which do not allow a State to punish peaceful demonstration activity merely because it may "imply" violence, *Terminiello v. Chicago*, 337 U. S. 1, or anger others into unjustified violence, *Cantwell v. Connecticut*, 310 U. S. 296; *Edwards v. South Carolina*, 372 U. S. 229; cf. *Wright v. Georgia*, 373 U. S. 284. (C) To the extent that the jury was permitted to convict under §16-388(2), on the theory that Hamm "without good cause or good excuse" (R. Hamm 85) refused to leave the lunch counter, conviction is barred by the vagueness doctrine of *Thornhill v. Alabama*, 310 U. S. 88, and *Herndon v. Lowry*, 301 U. S. 242. The terms in which goodness of cause or excuse were left to the uncontrolled discretion of the jury makes this a classic instance where "the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation . . . [so] that there exists the risk of continuing irregularity with which the vagueness cases have been concerned." Note, 109 U. PA. L. REV. 67, 93 (1960); see *id.* at 88-92, 107-109. Any judicial control or judicial review which might otherwise have been adequate to protect the defendant against these several separate impermissibilities was made impossible by the prosecution of the case from start to finish without definition of the charge or charges tried.

The requirement of *Cole v. Arkansas*, 333 U. S. 196, and *Shuttlesworth v. Birmingham*, 376 U. S. 940, is that a criminal charge be so defined, and its definition so consistently maintained throughout the prosecution, that a defendant can fairly present his case to trial and appellate courts, make and preserve his points of law and evidence, and obtain such appellate review as a State's procedures regularly make available. It is little enough to demand of the prosecution that it name the statute or common-law prin-

inciple under which it is proceeding in advance of trial and adhere to forms of regularity thereafter. *Cf. Russell v. United States*, 369 U. S. 749, 766-771. In Hamm's case, all efforts of defense counsel reasonably to delimit the charge were resisted. Nothing in the case prior to the close of the evidence gave defense counsel notice, for example, that the jury would be charged on theories of trespass involving a breach-of-the-peace component (R. Hamm 84-85), and therefore no evidence was presented by the defense for the purpose of persuading the jury on this issue. On the other hand, the prosecutor was permitted without objection to cross-examine the defendant concerning his motives for entering the McCrory store in the first instance (R. Hamm 75-77) after objection to cross examination of the defendant concerning an N. A. A. C. P. economic boycott of McCrory's was overruled on the theory that the defense had put "intent" in issue (R. Hamm 73). Application of regular rules of evidence in this posture was impossible, since neither the court nor defense counsel could have known what the issue of "intent" was, for want of definition of the crime charged. The Sixth Judicial Circuit, reviewing the jury's verdict, sustained it apparently under one statute and the Supreme Court of South Carolina under another—the two being equally plausible, and equally implausible, reconstructions of what the jury had done. The effect of this was to deprive Hamm of his statutory right of review by the Sixth Judicial Circuit, for if that court had viewed the charge as limited to §16-388(2)—as did the Supreme Court—it might have acquitted the defendant, for the reason discussed in Part III-A *supra*, or for insufficient proof of refusal to leave the premises, or otherwise; and such an acquittal would have been unreviewable by the South Carolina Supreme Court. *Spartanburg v. Winters*, 233 S. C. 526, 105 S. E. 2d 703 (1958) (alternative ground), and authorities cited. No conviction obtained on such a record can stand consistently with fundamental fairness.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

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TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION.

Sec. 201. (a) All persons shall be entitled to the full and equal Equal access. enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public Establishments is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; Lodgings.

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; Restaurants, etc.

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and Theaters, stadiums, etc.

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment. Other covered establishments.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country. Operations affecting commerce criteria.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof. Support by State action.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available. Private establishments.

Entitlement.

to the customers or patrons of an establishment within the scope of subsection (b).

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Interference.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Restraining orders; etc.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*. That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further*. That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

Community Relations Service.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary.

Hearings and investigations.

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The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

Sec. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventative relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Suits by Attorney General.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

Designation of judges.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Sec. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

District courts; jurisdiction.

Enforcement.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

TITLE III—DESEGREGATION OF PUBLIC FACILITIES

Suits by Attorney General.

SEC. 301. (a) Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 401 of title IV hereof, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

SEC. 302. In any action or proceeding under this title the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private person.

SEC. 303. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in any facility covered by this title.

SEC. 304. A complaint as used in this title is a writing or document within the meaning of section 1001, title 18, United States Code.

Costs, fees.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 2

ARTHUR HAMM, JR., PETITIONER,

versus

CITY OF ROCK HILL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

BRIEF FOR RESPONDENT, CITY OF ROCK HILL

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STATE OF SOUTH CAROLINA

BRIEF FOR RESPONDENT, CITY OF ROCK HILL

STATEMENT

Petitioner, a Negro, along with one Reverend C. A. Ivory, also a Negro, now deceased, entered a ten cent store in Rock Hill, South Carolina, on June 7, 1960. Ivory, a crippled person, was pushed in a wheel chair by petitioner. They made a purchase or two, and then proceeded to the lunch counter, where petitioner seated himself. Service of food was sought, which was refused. They were then asked to leave the store (R. Hamm 78) by the store manager, and

they refused to do so. Petitioner testified that the police requested the manager to ask him to leave. The police testified that the manager asked petitioner to leave on two occasions (R. Hamm 14, 21), and then the police asked him to leave before arresting him. The manager (R. Hamm 63, 64) was explicit in his testimony that he was the first to ask petitioner to leave.

Petitioner was tried in the Recorder's Court of the City of Rock Hill, **without a jury**, upon a stipulation that the **testimony** which had been adduced at the trial of the Reverend Ivory, now deceased, would be applicable to him. (R. Hamm 1.) He was found guilty by the City Recorder and sentenced to pay a fine of \$100.00 or serve thirty days. The conviction was affirmed by the Court of General Sessions on December 29, 1961, and by the Supreme Court of South Carolina on December 6, 1962. Rehearing was denied on January 11, 1963. The decision of the Supreme Court of South Carolina is reported at 241 S. C. 446, 128 S. E. (2d) 907.

ARGUMENT

I. **Enactment of the Civil Rights Act of 1964 has no effect on this conviction, since by its terms it does not purport to invalidate any provision of State law, unless such provision is inconsistent with any of the purposes of the Act, or any provision thereof. The case of Bell v. Maryland is inapplicable, since the remand there was for the purpose of considering the effect of a state law.**

The Civil Rights Act of 1964 by its terms does not abate this prosecution:

Section 1104. Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provi-

sion is inconsistent with any of the purposes of this Act, or any provision thereof. (Emphasis added.) 78 Stat. 268.

On reason, Section 16-388 of the South Carolina Code of Laws for 1962, under which petitioner was convicted, is not inconsistent with any purpose or provision of the Civil Rights Act of 1964. The most apparent relevant purpose is set forth in the title of the Act:

* * * "to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations" * * * 78 Stat. 241.

Section 16-388 of the South Carolina Code of Laws became effective on May 16, 1960, as an original Act and not as an amendment to any existing statute. It reads as follows:

Entering premises after warning or refusing to leave on request; jurisdiction and enforcement.—Any person who, without legal cause or good excuse, enters into the dwelling house, place of business or on the premises of another person after having been warned within six months preceding not to do so or any person who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than one hundred dollars or be imprisoned for no more than thirty days.

All municipal courts of this State as well as those of magistrates may try and determine criminal cases involving violations of this section occurring within the respective limits of such municipalities and magisterial districts. All peace officers of the State and its subdivisions shall enforce the provisions hereof within their respective jurisdictions.

The provisions of this section shall be construed as being in addition to, and not as superseding, any other statutes of the State relating to trespass or entry on lands of another. (1960 (51) 1729) 51 S. C. Stat., Act No. 743, at 1729-1730 (1960).

It was not unlawful at the time of petitioner's conviction and is not now unlawful for a Negro to seek the service of food at a restaurant which customarily does not serve Negroes. Petitioner was not convicted for attempting to secure service; he was convicted for failing to obey a lawful request that he leave the premises where he sought service. The consistency of the two provisions is apparent. Having made his request for service, and having been refused, it then became petitioner's duty to leave the premises upon being requested to do so by one in authority. He was then in a position to take such action as was available to him. At the time of this occurrence, none was available; now he has the Civil Rights Act of 1964 which provides for injunctive relief in a proper case. The Civil Rights Act does not give the right to trespass, either retroactively or prospectively. The reason for this is obvious; the law requires that peaceful means always be employed where possible. This is true no matter how substantial the right sought to be enforced. For example, to recover the possession of personal property from one wrongfully withholding, resort must be had to the courts if peaceful possession cannot be had. Only injunctive relief is available under the Civil Rights Act of 1964; it serves no purpose whatsoever for one seeking service to adamantly remain after being requested to leave, other than to increase the possibility that some intemperate action might result.

Admittedly, South Carolina would abate this conviction if the conduct penalized here were removed from the category of crimes. *State v. Spencer*, 177 S. C. 346, 181 S. E. 217. That, however, is not the case here. The language

from *Bell v. Maryland*, 12 L. Ed. (2d) 822, describing the substitution of a right for a crime, and *vice versa*, is not applicable here. The Civil Rights Act of 1964 imposes no criminal sanctions on one violating the provisions thereof; neither does it give one seeking its shelter the right to violate laws not reasonably inconsistent therewith.

There is language in *Bell, supra*, at page 829, which affords a solid basis for sustaining the right of a state to keep law and order by enforcing its laws impartially, as was done in the case at bar. In discussing the effect of saving clauses, the Court speaks of the different results obtaining by the use of "shall" or "is" in legislation, and cites a Maryland decision, *Beard v. State*, 74 Md. 130, 21 A. 700, holding that the use of "shall" rather than "is" connotes an obvious intention not to interfere with past offenses. The Civil Rights Act of 1964 repeatedly uses "shall" throughout. Is that not indicative of a Congressional intent that it operate prospectively? And is it not reasonable that one seeking to bring himself under the protection of the Act, having demanded his rights thereunder, must thereafter follow the procedure set forth therein; namely, a civil action for preventive relief? This course would contravene no definitive portion of the Act, and would contribute immeasurably to the efforts of an enlightened state to maintain law and order impartially. It is respectfully urged that this is the rule of reason and of law.

II. There has been no showing of any state action as defined in any previous decision of this Court which would invalidate petitioner's conviction. The decision to discriminate was a purely private decision not proscribed by the Fourteenth Amendment to the Constitution of the United States.

The only ground urged by petitioner upon the Supreme Court of South Carolina to support his claim of

state action under the Fourteenth Amendment was that the use of police officers to arrest and judicial machinery to convict constitutes state action. This contention has never been recognized by this Court, and it has had repeated opportunity to do so, the last being on June 22, 1964, when five decisions were announced. *Griffin v. Maryland*, *Barr v. Columbia*, *Robinson v. Florida*, *Bell v. Maryland*, and *Bonie v. Columbia*, 12 L. Ed. (2d) at pages 754, 766, 771, 822, and 894, respectively.

It is respectfully urged that the record discloses nothing which can reasonably be argued as constituting state action. There was no city ordinance, no state law, no official or unofficial proclamation of anyone in authority urging a policy of segregation.

Petitioner in his brief goes completely outside the record and argues that custom dictated by state policy requires segregation; that states are affirmatively required to end all discrimination by the Fourteenth Amendment; that no genuinely private concern is here involved. We think the simple answer is that a constitutional provision is here under consideration and that constitutional principles should apply.

Petitioner relies heavily on *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836. The dissenting opinion of Mr. Justice Black, joined by Mr. Justice Harlan and Mr. Justice White, in *Bell v. Maryland*, *supra*, effectively disposes of any tenable argument that the case at bar involves "state action" under *Shelley v. Kraemer*. It is further noted that the brief of the Solicitor General as *amicus curiae* in *Bell v. Maryland* agrees that the use of judicial machinery in and of itself is not "state action".

Petitioner argues, somewhat speciously, that he was only ordered to leave, but not to leave the premises, and therefore that his conduct proved does not conform to the

statutory prohibition. The short answer to this is found in the record (R. Hamm 78):

Q. And did the manager in the presence of the officers ask you to **leave the store?** (Emphasis added.)

A. In the presence of the officers, after the officer had requested him to do so.

If it be contended that a request by the officers that the manager ask petitioner to leave constitutes state action, how could an officer ever know that a person had in fact been requested to leave?

Petitioner's contention that the statute fails to fairly warn of prohibited conduct under the rule of *Bouie v. Columbia*, 12 L. Ed. 894, is manifestly without merit.

III. Petitioner has failed to preserve for review in this Court, in connection with the failure to require the State to elect at the outset the statute relied upon, any question of due process under the Fourteenth Amendment to the Constitution of the United States. The question of due process and equal protection of the laws under the Fourteenth Amendment was not raised by petitioner in the Supreme Court of South Carolina, and it was not decided by that Court without being raised. Consequently, the argument cannot now be made in this Court.

It is respectfully urged that petitioner here argues only a question of a State Court's determination of a procedural question. No attempt was made on appeal to the Supreme Court of South Carolina to argue a due process or equal protection violation under the Fourteenth Amendment. *City of Rock Hill v. Hamm*, Appellant's Brief, Appendix A. Under the settled practice in this Court, *Beck v. Washington*, 369 U.S. 541, 8 L. Ed. (2d) 98, 82 S. Ct. 955, that argument cannot be considered. The question was neither raised nor decided by the Supreme Court of South Carolina; nor did it refuse to decide the question because

of some technical failure to comply with a rule. The question was simply not before the Supreme Court of South Carolina in any form.

Respondent, while relying on its jurisdictional objection, nevertheless urges that there is no merit to petitioner's contention. Petitioner in his brief (P. 82) speaks of "this confusing record", but he, in no small measure, contributes to the confusion. On page 82 of his brief he attempts to make something of the fact that the order of the Supreme Court of South Carolina granting him a stay recites that he was convicted of the common law offense of breach of the peace. This order was prepared by petitioner's counsel and consented to by counsel for respondent. The recitation therein is meaningless, and the blame, if any, must at least be shared by petitioner.

What is of significance is the fact that petitioner was not tried before a jury, but was convicted by the City Recorder (R. Hamm 1) upon a stipulation that the testimony adduced at the trial of his companion would apply to him. Upon the death of the Reverend C. A. Ivory, the Transcript of Record should have been amended to delete all reference to jury charges and jury verdicts. This was not done, and consequently the Supreme Court of South Carolina treated the case as if a jury had convicted petitioner. A stipulation can only bind the parties. It can no more be stipulated that a jury will convict than that a judge will find a person guilty on a particular state of facts. This confusing state of the record is at least equally the fault of petitioner.

Stripping the record of its surplusage relating to verdicts and jury charges, we have the petitioner being convicted of trespass by the Court without a jury. A trial judge is not required to charge the law to himself. As the opinion of the Supreme Court states, it is manifest that the City Recorder relied on Section 16-388(2) of the Code.

This section is now 16-388. It is clear that there was an abundance of evidence upon which to convict. Under Section 17-502 of the South Carolina Code it is equally clear that petitioner could be tried one time, and one time only for his actions.

See. 17-502:

Double jeopardy after trial in minor court.— Whenever a municipal court or a magistrate's court shall have acquired jurisdiction by reason of a person committing an act which is alleged to be in violation of a municipal ordinance and which is in violation of the criminal law of this State a conviction or an acquittal by the first court acquiring jurisdiction shall be a complete bar to a trial by another court for the same alleged unlawful act or acts. (1952 Code § 17-502; 1942 Code § 994; 1932 Code § 994; 1928 (35) 1317.)

It is respectfully urged that no substantial question has been raised and that such question that has been raised cannot be considered in this Court.

CONCLUSION

For the reasons stated the judgment of the Supreme Court of South Carolina should be affirmed or in the alternative the Writ should be dismissed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY

HONORABLE GEORGE T. GREGORY, JR., JUDGE

CITY OF ROCK HILL, RESPONDENT,

versus

ARTHUR HAMM, JR., APPELLANT

APPELLANTS' BRIEF

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QUESTIONS INVOLVED

1. Did the Court err in refusing to require the City of Rock Hill to elect as to which law it would proceed upon? (Exceptions 1 and 2.)
2. Did the Court err in refusing to hold that the evidence shows conclusively that by arresting appellant, the officers of the City of Rock Hill were aiding and assisting the owners and management of McCrory's five and ten cent store in maintaining their policy of segregating or excluding service to Negroes at their lunch counters on the ground of race or color, in violation of appellant's right to due process of law and equal protection of the laws, secured by the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4 and 5.)
 - A. Whether the enforcement of segregation in this case was by State action within the meaning of the Fourteenth Amendment.

STATEMENT

On June 7, 1960, appellant, along with Rev. C. A. Ivory, now deceased, entered the premises of McCrory's 5 & 10 Cent Store in Rock Hill, South Carolina. Rev. Ivory was a cripple and confined to a wheel chair, and was pushed into the store by the appellant. Appellant, along with Rev. Ivory, proceeded down the aisles where they made one or two purchases. Thereafter, they proceeded over to the end of the lunch counter near the front of the store where Rev. Ivory, still in his wheel chair, came to a stop at said counter. The appellant, Hamm, took a seat on a stool at the lunch counter. Both appellant and Rev. Ivory sought to be served at the lunch counter. They were not served and, in fact, were told by the management that they could not be served and would have to leave.* (Tr. p. 16, f. 63.)

The appellant and Rev. Ivory refused to leave and remained seated at the lunch counter. They were orderly in every respect except for the refusal to leave (Tr. p. 24, f. 95).

Shortly after appellant's and Rev. Ivory's arrival at the lunch counter, City police officers entered the premises and placed both under arrest. The arrests of both were made without the manager of McCrory's 5 & 10 Cent Store having requested same (Tr. p. 29, f. 114). Appellant and Rev. Ivory were thereupon charged with trespass after notice.

There were members of the white race seated at the lunch counter who were being served and no request was made that they leave nor were they told that they could not be served (Tr. p. 39, f. 155).

Rev. Ivory was tried in the Recorder's Court for Rock Hill on June 29, 1960 before a jury who returned a verdict of guilty and thereupon Rev. Ivory was sentenced to pay a fine of \$100.00 or serve thirty days in the City jail. Notice of intention to appeal was duly served upon the City Recorder.

* The evidence shows conclusively that this statement was made pursuant to McCrory's policy of not serving Negroes at its lunch counter.

Thereafter, by stipulation, it was agreed that the testimony which was offered in the case against Rev. C. A. Ivory was the same which would be offered in the case against the appellant, Arthur Hamm. The appellant, Hamm, was thereupon found guilty and sentenced to pay a fine of One Hundred Dollars (\$100.00) or serve thirty days in prison. Notice of intention to appeal was thereupon duly served upon the City Recorder.

Thereafter the matter was argued before Honorable George T. Gregory, Jr., Residing Judge, Sixth Judicial Circuit. On December 29, 1961, Judge Gregory issued an order affirming the convictions by the Recorder's Court of the City of Rock Hill.

Notice of Intention to appeal was thereupon duly served upon the City Attorney.

Question I

Did the Court err in refusing to require the City of Rock Hill to elect as to which law it would proceed upon? (Exceptions 1 and 2.)

The warrant charges that appellant, along with Rev. C. A. Ivory, now deceased, committed the act of trespass at McCrory's variety store on June 7, 1960. No designation of the specific statute or ordinance is found in the affidavit which is a part of the warrant.

Two statutes and one ordinance defined and proscribed criminal trespass, and, at the commencement of the trial, appellant's counsel moved to require the City to elect or specify as to which law it would proceed upon (Tr. pp. 643, ff. 21-49). The Court refused to require an election and observed that the "warrant informs the defendant what he is charged with" (Tr. p. 43, f. 49). At the conclusion of the trial, the jury returned the following verdict: "We find the defendant guilty" (Tr. p. 112, f. 445). Thus, appellant was arrested and tried under a warrant which vaguely set forth the offense charged by referring to its generic name (trespass) and was later informed that the term trespass included acts proscribed by (1) The act of 1960, now codified as Sec. 16-388, Code

of Laws of South Carolina, 1962; (2) Section 16-386, Code of Laws of South Carolina, 1952; and (3) Chapter 19, Section 12, Code of the City of Rock Hill (Tr. p. 116, ff. 462-464).

Appellant submits that he was entitled to an election by the City as to which of the criminal laws above set forth, under which he would be tried. *State v. Butler*, 230 S. C. 159, 94 S. E. (2d) 761.

Since all of the criminal laws above set forth impose penalties upon conviction of thirty days imprisonment, or One Hundred (\$100.00) Dollars fine, the Recorder had jurisdiction but, under 43-114, Code of Laws of South Carolina, the Recorder should have required the City to elect. See also Section 15-902 and Section 17-502, Code of Laws of South Carolina for 1952.

Question II

Did the Court err in refusing to hold that the evidence shows conclusively that by arresting appellant, the officers of the City of Rock Hill were aiding and assisting the owners and management of McCrory's Five and Ten Cent Store in maintaining their policy of segregating or excluding service to Negroes at their lunch counters on the ground of race or color, in violation of Appellant's right to due process of law and equal protection of the laws, secured by the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4 and 5.)

A. Whether the enforcement of segregation in this case was by State action within the meaning of the Fourteenth Amendment.

The evidence presented is to the effect that McCrory's Five and Ten Cent Store is a large variety store which sells thousands of items to the public at its Rock Hill, South Carolina store. It invites all members of the public into its premises to do business and serves all persons who respond to the invitation to do business courteously and without regard to race, except at its lunch counter, which is operated for white persons only.

The store manager testified that the exclusion of Negroes from lunch counters in McCrory's and similar stores in Rock Hill is in accordance with local custom.

When the appellant seated himself at the lunch counter, he was told within a short time thereafter that he could not be served and that he would have to leave and subsequently was placed under arrest.

It is respectfully submitted that the evidence presented in this matter shows conclusively that by arresting the appellant, the officers of the City of Rock Hill were aiding and assisting the management of McCrory's Five and Ten Cent Store in maintaining its policy, and the policy of the City of Rock Hill and the State of South Carolina, of racial segregation. Therefore, the arrest and conviction of appellant under the circumstances shown herein contravenes the Fourteenth Amendment's interdiction against State enforced racial segregation.

The application of a general, nondiscriminatory and otherwise valid law to effectuate a racially discriminatory policy of a private business or agency, and the enforcement of such an discriminatory policy by the State governmental organs, has been held repeatedly to be a denial by State action of rights secured by the Fourteenth Amendment. Thus, in *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 835, the judicial enforcement of private racially restrictive covenants by injunctions was held violative of the Fourteenth Amendment. And, in *Barroux v. Jackson*, 346 U. S. 249, . . . L. Ed. S. Ct., it was held that such covenants could not be enforced, consistent with the Fourteenth Amendment, by the assessment of damages for their breach. In *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276, the Supreme Court held that the criminal Courts could not be used to convict for trespass persons exercising their rights of free speech in a privately owned company town.

Nor is it material to assert that the State judicial action which enforces the denial of rights guaranteed by the Fourteenth Amendment are procedurally fair. Such action is constitutionally proscribed "even though the judicial proceedings. . . . may have been in complete accord with

the most rigorous conceptions of procedural due process." *Shelley v. Kraemer, supra*. See also *Bridges v. California*, 314 U. S. 252; *American Federation of Labor v. Swing*, 312 U. S. 321; *Cantwell v. Connecticut*, 310 U. S. 296. Similarly, it is no answer to say that the same Court (Recorder's Court) stands ready to convict non-Negro citizens of trespass and breach of the peace should they refuse to leave a business establishment similar to McCrory's five and ten cent store from whose lunch facilities they have been excluded solely because of race or color. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequities." *Shelley v. Kraemer, supra*.

The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses (*Mayor and City Council of Baltimore v. Dawson*, 350 U. S. 877, 100 L. Ed. 744, 76 S. Ct. 133 affirming 220 F. (2d) 368); golf course (*Holmes v. City of Atlanta*, 350 U. S. 879, 100 L. Ed. 766, 76 S. Ct. 141, reversing 223 F. (2d) 93); park and recreational facilities (*New Orleans City Park Improvement Assn. v. Detiege*, 358 U. S. 54, 3 L. Ed. (2d) 46, 79 S. Ct. 228, affirming 252 F. (2d) 123); and theaters (*Muir v. Louisville Park Theatrical Ass'n*, 347 U. S. 971, 98 L. Ed. 1112, 74 S. Ct. 783, reversing 202 F. (2d) 275, and remanding for consideration in light of *Brown v. Board of Education*, 347 U. S. 483, and "Conditions that now prevail").

A restaurant, like a theater, a common carrier, a school, a beach, a pool, a park, or a golf course, is a place of public accommodation. Federal Courts have held, therefore, that rights guaranteed by the equal protection clause are contravened when a private lessee of a state-owned restaurant engages in a racially discriminatory practice. *Derrington v. Plummer*, 240 F. (2d) 924.

Where the State enforces or supports racial discrimination in a place open for use of the general public, it infringes Fourteenth Amendment rights notwithstanding the

private origin of the discriminatory conduct. *Muir v. Louisville Park Theatrical Ass'n, supra.*

Nor, we submit, is it relevant that the property upon which discrimination occurs is privately owned. State laws which require or permit segregation of the races on privately owned intrastate motor buses are invalid under the Fourteenth Amendment. *Gayle v. Browder*, 352 U. S. 903, 1 L. Ed. (2d) 114, 77 S. Ct. 145, *Fleming v. South Carolina Electric & Gas Co.*, 224 F. (2d) 752, appeal dismissed 351 U. S. 901, 100 L. Ed. 1439, 76 S. Ct. 692. Racial discrimination by a privately owned place of public accommodation may also violate Fourteenth Amendment rights if such place is financially supported or regulated by the State, *Kerr v. Enoch Pratt Free Library*, 149 F. (2d) 212, *cetiorari denied*, 326 U. S. 721.

It is respectfully submitted that restrictions have long been placed upon proprietors whose operations are of a public nature, affecting the community at large. In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, the Supreme Court of the United States said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the interest he has thus created. . . ."

Similarly, in *Marsh v. Alabama, supra*, the Court said:

"Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . ."

Justification for invasion of the right to be free from State enforcement of racially discriminatory practices can be supported, if at all, only where the constitutional right is subordinated to a countervailing right or interest so

weighty as to occupy a preferred constitutional status. *Cf. Kore-Matsu v. United States*, 323 U. S. 214. The narrow issue in the present case is not whether the right, for example, of a homeowner to chose his guests (as is argued by the City) should prevail over defendant's constitutional right to be free from the state enforcement of a policy of racial discrimination, but, rather, whether the interest of a proprietor, or management, who has opened up his business property for use by the general public . . . in particular, by the persons invited in to trade at numerous departments in drug stores . . . should so prevail.

Since the conviction of this appellant resulted from the racially discriminatory policy of the management of McCrory's five and ten cent store and the official intervention and aid of the police of the City of Rock Hill, it is submitted that it cannot stand and should be reversed by this Court.

CONCLUSION

For the reasons herein stated, the judgment of the Court of General Sessions for York County affirming the judgment of the Recorder's Court of the City of Rock Hill should be reversed.

Respectfully submitted,

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